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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 902

MICHAEL V. SCIORTINO,

Petitioner,

—v.—

THE HONORABLE ROBERT C. ZAMPANO,
UNITED STATES DISTRICT JUDGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID GOLDSTEIN
JACOB D. ZELDES
ELAINE S. AMENDOLA
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

MICHAEL V. SCIORTINO,

Petitioner,

—v.—

THE HONORABLE ROBERT C. ZAMPANO,
UNITED STATES DISTRICT JUDGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Michael V. Sciortino prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on November 3, 1967 (1a).[1]

Opinion Below

The opinion of the court of appeals, as yet unreported, is printed in the appendix to this petition (1a).

Jurisdiction

The judgment of the court of appeals was entered on November 3, 1967 (1a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

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[1] References to the numbered pages of the appendix to this petition are indicated _____ (a).

Question Presented

Does the return of an indictment by a grand jury eliminate the right of a criminal defendant, arrested pursuant to a U. S. commissioner's warrant, to a previously scheduled preliminary examination before the commissioner pursuant to Rule 5, Federal Rules of Criminal Procedure?

Constitutional Provision and Rule Involved

Petitioner contends that following an arrest upon a commissioner's warrant, he is entitled to a preliminary hearing pursuant to Rule 5 of the Federal Rules of Criminal Procedure which provides in part:

> "(c) —Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

Petitioner also maintains that his right to a preliminary hearing is reinforced by the Sixth Amendment to the United States Constitution (34a).

Statement

By an original mandamus action filed in the court of appeals, petitioner obtained appellate review of the rulings of the District Court for Connecticut relating to his right to a preliminary hearing in a criminal action in which petitioner is the defendant (1a, 35a).

In that criminal action (50a), petitioner—a Bridgeport, Connecticut, physician—was first arrested on June 22, 1967, upon a commissioner's warrant charging him with the unlawful selling of depressant and stimulant drugs in violation of 21 U. S. C. §§331(q) and 360a(b) (2a, 35a, 41a).

Following his arrest, petitioner was taken before a U. S. commissioner, who admitted him to bail without surety and, by agreement of counsel, continued until July 11, 1967, the preliminary hearing required by Rule 5 of the Federal Rules of Criminal Procedure (2a-3a, 35a-36a). The Government announced it would probably present the case to the grand jury on July 10, 1967 and would contend, if an indictment were returned, that the commissioner no longer had power to hold a preliminary hearing (3a).

On July 10, 1967, the day before the scheduled Rule 5 hearing, the Government presented the case against petitioner to the grand jury, which returned a three count indictment charging violations of 21 U. S. C. §§331(q)(2) and 360a(b) (3a, 36a-37a). All three counts are misdemeanors. Just prior to the grand jury action, petitioner, by motion dated and served upon the Government July 7, 1967, re-

quested the district court to restrain the Government from presenting the case to the grand jury and to discharge petitioner unless the Government proceeded to a preliminary hearing before the commissioner (3a, 36a, 45a-47a). Respondent, a United States District Judge for the District of Connecticut, denied petitioner's motion on July 10, 1967 (3a, 36a, 49a). Respondent's order, denying petitioner's motion to restrain the Government and to discharge petitioner unless a preliminary hearing were held, was the initial ruling challenged by petitioner in the court below (1a, 37a).

The July 11, 1967, preliminary examination was continued until July 24, 1967 by the commissioner who, at the request of petitioner, issued a subpoena directing the presence of a witness for that time (3a, 37a, 53a). Immediately prior to the scheduled hearing on July 24, 1967, respondent granted the Government's motion to quash the subpoena (3a, 37a). Respondent's ruling quashing the subpoena at the request of the Government was the second of respondent's rulings challenged in the mandamus action below (1a, 37a).

The jurisdiction of the court below was predicated upon 28 U. S. C. §1651(a) (35a, 38a). After hearing, the court denied relief, holding that the return of the grand jury indictment in the criminal action established probable cause and, therefore, eliminated petitioner's right to a preliminary hearing before the commissioner (1a-7a).

Reasons for Granting the Writ

This petition presents a single question which relates to the right of an accused to a preliminary hearing pursuant to Rule 5 of the Federal Rules of Criminal Procedure and which has wide impact upon the administration of criminal law in the federal courts. Review of the decision of the court below is called for because (1) it is in conflict with a decision of the Court of Appeals for the District of Columbia on the same issue; (2) it has decided an important question of federal law which has not been, but should be, decided by this Court; and (3) it has decided an important federal question through misreliance on a decision of this Court.

1. The decision of the court below in the instant case is directly in conflict with the decision of the Court of Appeals for the District of Columbia in *Ross* v. *Sirica,* 380 F. 2d 557 (D. C. Cir. 1967) (8a)—a conflict clearly recognized by the court below (6a).

In *Ross*—also an action in the nature of mandamus—the court held, as petitioner here unsuccessfully asserted, that the right to a preliminary hearing is not forfeited by the return of an indictment. In *Ross,* as here, the petitioner was arrested upon a warrant and brought before the commissioner who continued the preliminary hearing to afford the petitioner an opportunity to consult counsel. Before the preliminary hearing could be rescheduled, the Government presented the case to a grand jury, and an indictment was returned. Thereafter, when Ross sought to assert his right to a preliminary hearing, the district court, as here, ruled that as a result of the supervening indictment, Ross's right to a preliminary hearing before the commissioner had been forfeited.

In *Ross*, the court of appeals issued its writ of mandamus directing the district court to reopen the preliminary hearing, stating:

> "We have recognized that the preliminary hearing is an important right of an accused affording him '(1) an opportunity to establish that there is no probable cause for his continued detention . . . and (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him'. *Blue* v. *United States, supra,* 119 U. S. App. D. C. at 322, 342 F. 2d at 901 (footnote omitted). We have held that the accused is entitled to counsel at such hearings and that he may obtain subpoenas to compel the attendance of 'material witnesses reasonably requested . . .' Moreover, we have held that the right to a preliminary hearing, if timely asserted, is not forfeited solely by the later return of an indictment." *Ross* v. *Sirica, supra,* 380 F. 2d at 559 (10a).

The sharp conflict between the decision below and the *Ross* case is not an isolated instance of the schism existing between the Second Circuit and the District of Columbia Circuit with respect to the import of a supervening indictment upon the right to a Rule 5 hearing. Comparison of the authorities relied on by the two courts reveals that the conflict is deeply rooted in the purposes attributed to the preliminary hearing.

The court below held that the preliminary hearing did not have a discovery function but existed solely as a means for determining probable cause (5a). In so ruling, it felt bound by its prior decisions in *United States* v. *Aiken,* 373 F. 2d 294 (2 Cir.), *cert. denied,* 36 U. S. L. WEEK 3144

(October 9, 1967); *United States* v. *Gilchrist*, 347 F. 2d 715 (2 Cir. 1965); and *United States* v. *Heap*, 345 F. 2d 170 (2 Cir. 1965) (6a).

The District of Columbia court, on the contrary, viewed the preliminary hearing as an important defense device to discover in advance of trial the foundations of the charge and the evidence which will comprise the Government's case (10a). In so ruling, it also felt bound by its prior decisions in *Blue* v. *United States*, 342 F. 2d 894, 900 (D. C. Cir.), *cert. denied*, 380 U. S. 944 (1965); *Dancy* v. *United States*, 361 F. 2d 75, 77-78 (D. C. Cir. 1966); and *Holmes* v. *United States*, 370 F. 2d 209, 210 (D. C. Cir. 1966) (10a). In *Holmes*, Judge Wright had pointed out:

> "In Blue v. United States, *supra*, and in Dancy v. United States, . . . we have made it very clear that an effective preliminary hearing is one of the important rights of a defendant charged with crime—that such a hearing gives a defendant 'a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him.'" 370 F. 2d at 210.

The conflict, then, between the Second Circuit and the District of Columbia Circuit, as now ripened by the decision in the instant case, is the product of irreconcilable interpretations concerning the scope and function of the Rule 5 preliminary hearing. The petitioner in *Ross*, by the sheer accident of having been arrested in the District of Columbia, was granted his right to a preliminary hearing. But petitioner here, because he was arrested in Connecticut rather than in the District of Columbia, has been denied that right in the same federal system. Such disharmony in the federal

system calls for a resolution by this Court by the exercise of its certiorari jurisdiction.

2. The conflict between the District of Columbia and the Second Circuit over the proper function of a Rule 5 hearing—a function as yet undefined by this Court—also deserves the Court's attention because of the issue's wide impact on the administration of criminal procedure. The Government's "widespread practice 'of delaying preliminary hearing until an indictment can be obtained,' 8 Moore's Federal Practice ¶5.04 [3]," thereby destroying the defendant's ". . . most valuable discovery technique available to him," *Wheeler* v. *Flood,* 269 F. Supp. 194, 196-197, 198 (E. D. N. Y. 1967), has potential impact upon more than 25,000 criminal defendants who appear each year before the 734 U. S. commissioners after arrest on criminal offenses.[2] Resolution of an issue with such dimension is a proper exercise of this Court's "supervisory powers to formulate and apply proper standards for an enforcement of the criminal law." *Marshall* v. *United States,* 360 U. S. 310, 313 (1959).

Petitioner's claim is in essence based on Rule 5. But it also gains strength from petitioner's rights in all "criminal prosecutions" to be confronted with the witnesses against him, to be informed of the nature and cause of the accusa-

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[2] The reports regularly filed by commissioners with the Administrative Office of the U. S. Courts do not disclose either the number or the nature of the preliminary hearings held or petty offenses tried by them. However, a special study was undertaken by the Administrative Office in the latter part of 1964 to develop information on these subjects. There were 26,729 defendants brought before the 734 commissioners for preliminary hearings in the fiscal year 1964. *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary,* 89th Cong., 2nd Sess., part 2, 49 (1965).

tion and to have compulsory process, as guaranteed by the Sixth Amendment (34a). Certainly, the Sixth Amendment right to counsel applicable to "criminal prosecutions" is not limited to the actual trial of a case. *Massiah* v. *United States*, 377 U. S. 201 (1964); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). Other Sixth Amendment rights involved here —to confront witnesses, to know the nature of the charge, and to have compulsory process—likewise cannot be limited to the trial itself. As Chief Justice Marshall said over 150 years ago, while sitting as a circuit judge:

> "Upon immemorial usage, then, and upon which is deemed a sound construction of the Constitution and law of the land, the court is of the opinion that any person charged with a crime in the courts of the United States has a *right, before as well as after indictment,* to the process of the court to compel the attendance of his witnesses." *United States* v. *Burr*, 25 Fed. Cas. 30, 33 (C. C. Va. 1807) (Emphasis added).

The involvement of these important constitutional rights affords added basis to review the decision below.

Effective supervision of criminal procedure in the federal courts, then, requires this Court to settle the question of whether the prosecution can flout Rule 5 and "proceed in a fashion which gives it the benefits of two different procedures—arrest without prescreening of the grand jury; indictment without discovery at the preliminary examination—and the disadvantages of neither." Amsterdam, Segal, Miller, I TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §133 (1967).[3]

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[3] "Prosecutors . . . do everything within their power to avoid preliminary hearings," stated Professor Irving Younger, testifying before the Senate Subcommittee on Improvements in Judicial Machinery. He went on to say:

Petitioner's case presents the appropriate case for determining the proper function of a Rule 5 hearing. Significantly, in the *Ross* case, where the Government did not prevail, it avoided review by this Court. But it is not petitioner's cause alone that is here involved. Rather, this petition presents an issue, unresolved by this Court, hav-

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"... to my knowledge, no defendant in any criminal case in the southern district of New York has ever received a preliminary hearing. How is it done? When a defendant is arrested and is brought before the commissioner, an assistant U. S. attorney is present to represent the Government. The commissioner must, and does, inform the defendant of his right to a preliminary hearing. The commissioner will frequently go on to suggest to the defendant, either explicitly or implicitly, that no purpose would be served by a preliminary hearing, and that the defendant should waive it. If the defendant waives a preliminary hearing, the matter is ended. If the defendant says that he does not wish to waive a preliminary hearing, the commissioner will set the hearing down for a date 5 or 6 days hence. If possible, the prosecutor will then simply obtain an indictment before the date for the preliminary hearing; the hearing thus becomes moot. . . .

"If, for whatever reason, the prosecutor cannot obtain an indictment within that time, he calls the commissioner's secretary (or, more frequently, has a clerk in the office of the U. S. attorney call the commissioner's secretary) and postpones the hearing. He may then obtain an indictment before the new adjourned date. If he fails to do so, he will adjourn the hearing again, and so on and so on. . . .

"The defendant is never given an opportunity to be heard on the question whether the hearing date should be adjourned. He is usually not even given notice of the prosecutor's application for an adjournment. Indeed, the prosecutor does not even apply to the commissioner for an adjournment. The practice has been for the prosecutor (or a clerk from his office) simply to mark on the commissioner's calendar the fact that the hearing has been adjourned. The commissioner may not even be aware of the adjournment. He pays little attention to his schedule of hearings, because he knows that no hearing will ever take place or has ever taken place." *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2nd Sess., part 3, 220-221 (1966).

ing wide impact on the administration of criminal justice. Absent review here, then, "there is danger that the violations may occur so frequently that the interests of the general public, as well as the individual petitioner, are directly at stake." *Wilson* v. *Anderson,* 335 F. 2d 687, 691 (D. C. Cir. 1964).

3. Review by this Court is also appropriate because the decision of the Court below has determined an important federal question by misreliance on this Court's decision in *Jaben* v. *United States,* 381 U. S. 214 (1965), in which the Court mentioned in *dictum* that the Government must afford the defendant a preliminary hearing "unless before the preliminary hearing is held, the grand jury supersedes the complaint procedure by returning an indictment." 381 U. S. at 220. The court below relied on the *Jaben* dictum as direct authority for the proposition that the return of an indictment eliminates the necessity for a preliminary examination (4a). The *Ross* court, however, properly noted that the defendant in *Jaben* had made no effort to obtain a preliminary hearing during the one month interval between the filing of the complaint and the return of the indictment, and stated:

> "*Jaben* does not undermine the holding in *Blue* that an accused who demands the preliminary hearing as is his right is entitled to such a hearing and that, if the point is properly and timely pressed, a denial of that hearing cannot be excused by pointing to an intervening grand jury indictment." 380 F. 2d at 560-561 (14a).

Conclusion

Rule 5 forthrightly states that once an accused is arrested he must be presented before a commissioner who "shall" hear the evidence. The decision of the court below, which petitioner contends is erroneous and which is concededly in conflict with the decision of another circuit, rejects this clear command of Rule 5.

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

DAVID GOLDSTEIN
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Bridgeport, Connecticut

Counsel for Petitioner

December 7, 1967.

APPENDIX

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UNITED STATES COURT OF APPEALS

Opinion of Court of Appeals 1a

Conflicting Opinion of Court of Appeals for the District of Columbia Circuit, Filed 4a

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Motion of Petitioner Michael V. Severino for an Order in the Nature of a Writ of Mandamus 20a

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Petition for an Order in the nature of a writ of mandamus directing the Honorable Robert C. Zampano, United States District Judge for the District of Connecticut, to order a preliminary examination of petitioner pursuant to Rule 5(c) of the Federal Rules of Criminal Procedure.

Denied.

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1967.

(Argued October 2, 1967 Decided November 3, 1967.)

Docket No. 31677

MICHAEL V. SCIORTINO,

Petitioner,

—v.—

THE HONORABLE ROBERT C. ZAMPANO,
United States District Judge,

Respondent.

Before:

FRIENDLY, HAYS and ANDERSON,

Circuit Judges.

Petition for an order in the nature of a writ of mandamus directing the Honorable Robert C. Zampano, United States District Judge for the District of Connecticut, to order a preliminary examination of petitioner under Rule 5(c) of the Federal Rules of Criminal Procedure.

Denied.

JACOB D. ZELDES, Bridgeport, Connecticut (David Goldstein and L. Douglas Shrader, Bridgeport, Connecticut, on the brief), *for Petitioner.*

JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Respondent.*

HAYS, *Circuit Judge*:

Petitioner seeks an order in the nature of a writ of mandamus directing the district court to order the United States Commissioner to conduct a preliminary examination of petitioner under Rule 5(c) of the Federal Rules of Criminal Procedure.[1] We deny the writ.

Petitioner, a Bridgeport, Connecticut physician, was arrested on June 22, 1967 upon a commissioner's warrant charging him with the unlawful sale of depressant and stimulant drugs in violation of 21 U. S. C. §§331(q) and 360a(b). He was brought before a commissioner, advised of his rights, and admitted to bail. Petitioner's counsel

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[1] Rule 5 . . .

(c) —Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

asked the government to agree to a postponement of the preliminary examination until July 11 because his associate, who would be handling the case, was out of the state. The government consented, but announced that it would present the case to a grand jury on July 10 and that, if an indictment was returned, it would contend that the commissioner no longer had power to hold a preliminary hearing.

On July 10 petitioner moved for an order enjoining the United States Attorney from presenting the case to the grand jury. The motion was denied, and later that day the grand jury returned an indictment.

On July 11 the commissioner continued the preliminary hearing until July 24 and, at petitioner's request, issued a subpoena directed to the government's principal witness. Just prior to the scheduled hearing respondent granted the government's motion to quash the subpoena, and the commissioner adjourned the hearing.

Petitioner's principal contention is that the preliminary examination provided by Rule 5(c) of the Federal Rules of Criminal Procedure is intended to serve as a means of discovery for the accused as well as a forum for determining probable cause, so that the need for such an examination is not eliminated by the return of an indictment.

There is nothing in the language or the history of Rule 5 to suggest that the preliminary examination has any purpose other than to afford a person arrested upon complaint an opportunity to challenge the existence of probable cause for detaining him or requiring bail. The extensive review of the history of the drafting of Rule 5 contained in 1 Orfield, *Criminal Procedure under the Federal Rules*, 203-224 (1966), contains not a word to suggest that in the draft-

ing of the rule there was any purpose to provide the accused with a discovery procedure. See also Orfield, Section 5:7, Functions of Preliminary Examination: "But the purpose is not to give discovery, before trial, of the government's case. The indictment plus a bill of particulars is all that the defendant is entitled to."

There is extensive authority in the cases for the proposition that the return of an indictment which establishes probable cause, eliminates the need for a preliminary examination. In *Jaben* v. *United States,* 381 U. S. 214, 220 (1965) the Supreme Court said:

> "[W]e think that the Government must proceed through the further steps of the complaint procedure by affording the defendant a preliminary hearing as required by Rule 5, unless before the preliminary hearing is held, the grand jury supersedes the complaint procedure by returning an indictment."

See to the same effect: *United States* v. *Heap,* 345 F. 2d 170, 171 (2d Cir. 1965); *Rivera* v. *Government of the Virgin Islands,* 375 F. 2d 988, 990 (3d Cir. 1967); *United States* v. *Chase,* 372 F. 2d 453, 467 (4th Cir.), cert. denied, 387 U. S. 907 (1967); *Boone* v. *United States,* 280 F. 2d 911 (6th Cir. 1960); *Vincent* v. *United States,* 337 F. 2d 891, 896 (8th Cir. 1964), cert. denied, 380 U. S. 988 (1965); *Byrnes* v. *United States,* 327 F. 2d 825, 834 (9th Cir.), cert. denied, 377 U. S. 970 (1964).

A post-indictment preliminary examination would be an empty ritual, as the government's burden of showing probable cause would be met merely by offering the indictment. Even if the commissioner disagreed with the grand jury, he could not undermine the authority of its finding.

Petitioner relies on the recent decision of the Court of Appeals for the District of Columbia Circuit in *Ross* v. *Sirica*, 380 F. 2d 557 (D. C. Cir. 1967). Ross was indicted following a preliminary examination at which his right to subpoena witnesses had been unduly curtailed, and he sought a writ in the nature of mandamus ordering a second preliminary examination. The court held that a second preliminary examination was required in spite of the intervening indictment.

We cannot agree to elevating into a right to be enjoyed by an accused the pure fortuity that where a preliminary hearing is held there is necessarily some discovery of the government's evidence. It is quite clear from the logic as well as the history of the procedure that discovery is *not* one of its purposes. It defies logic, for example, to allow such discovery to defendants who happen to be arrested before indictment and to deny it to those who are arrested after indictment.

The subject of discovery in criminal cases received a great deal of attention at the hands of those responsible for the original preparation of the Federal Rules and their recent amendment. See Orfield, *op. cit. supra;* Symposium, Discovery in Criminal Cases, 33 F. R. D. 47 (1963); Comment, Federal Rules of Criminal Procedure—Rule 16, Second Preliminary Draft of Proposed Amendments—Use of Protective Orders as a Safeguard in Broadened Criminal Discovery, 113 U. Pa. L. Rev. 1295 (1965); Fontana, Discovery in Criminal Cases—A Survey of the Proposed Rule Changes, 25 Maryland L. Rev. 212 (1965); Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo. L. J. 1276 (1966). It is most unlikely that having provided carefully for a limited discovery in Rules 7(f), 16 and 17.1 the

draftsmen intended that the discovery adventitiously attached to the preliminary hearing should constitute a further right of the accused.[2]

As a matter of fact, not only have the views of the District of Columbia not found favor in any other circuit, but the reasoning on which the panel of the court in *Ross* relied lacks the support of a majority of the judges of the circuit. In the case of *Crump* v. *Anderson,* 352 F. 2d 649 (D. C. Cir. 1965) another panel rejected that reasoning. Moreover, in stating their positions on an application for rehearing in *Ross* three judges of the court expressed themselves as being in disagreement with the decision and two more said that they agreed with the government that supplementary hearings were not available purely as discovery, but added "we also believe they may be available in case of serious defect in the [original] preliminary hearing." Thus five of the nine judges of the District of Columbia Circuit would apparently not hold that *Ross* governs the present petition.

In any event adoption of the *Ross* rule in this circuit is foreclosed by our decisions in *United States* v. *Aiken,* 373 F. 2d 294 (2d Cir.), cert. denied, 36 U. S. L. Week 3144 (October 9, 1967); *United States* v. *Gilchrist,* 347 F. 2d 715 (2d Cir. 1965); and *United States* v. *Heap,* 345 F. 2d 170 (2d Cir. 1965).

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[2] Those who advocate broadening the scope of discovery in criminal cases do not suggest expanding the functions of the preliminary hearing as a means of accomplishing this result. See 113 Cong. Rec. 1883, 1885 (Daily ed., Feb. 9, 1967) (Statement of Senator Tydings), quoted in *Ross* v. *Sirica,* 380 U. S. 557, 562, 564-65 (D. C. Cir. 1967) (Statement of Circuit Judges McGowan and Leventhal As to Why They Vote To Deny Rehearing *En Banc*).

Petitioner also contends that there is a constitutional right to a preliminary hearing. This claim is without foundation. See, e.g., *Goldsby* v. *United States,* 160 U. S. 70, 73 (1895); *Dillard* v. *Bomar,* 342 F. 2d 789, 790-91 (6th Cir.), cert. denied, 382 U. S. 883 (1965) (citing many cases). See also *United States ex rel. Kassin* v. *Mulligan,* 295 U. S. 396, 400 (1935).

Petition denied.

Conflicting Opinion of Court of Appeals for the District of Columbia Circuit in *Ross* v. *Sirica*

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

(Argued November 23, 1966 Decided January 23, 1967.)

GEORGE E. ROSS, JR.,

Petitioner,

—v.—

THE HONORABLE JOHN J. SIRICA,
United States District Judge,

Respondent.

No. 20535

Petition for Rehearing *en Banc*
Denied March 24, 1967

MR. KARL G. FEISSNER, Washington, D. C., *for petitioner.*

MR. GEOFFREY M. ALPRIN, Asst. U. S. Atty., with whom Messrs. David G. Bress, U. S. Atty., and Frank Q. Nebeker, Asst. U. S. Atty., were on the pleadings, *for respondent.*

Before:

BAZELON, *Chief Judge,* and
FAHY and WRIGHT, *Circuit Judges.*

PER CURIAM:

We are asked to issue a writ in the nature of mandamus directing the District Judge to remand this case for a proper preliminary hearing in accordance with the procedure outlined in *Blue* v. *United States*, 119 U. S. App. D. C. 315, 321, 342 F. 2d 894, 900 (1964), cert. denied, 380 U. S. 944, 85 S. Ct. 1029, 13 L. Ed. 2d 964 (1965). For reasons which follow, we think the preliminary hearing should be reopened.

Petitioner was arrested on a charge of first degree murder and brought before a United States Commissioner. A continuance was granted to permit counsel assigned by the Legal Aid Agency to represent petitioner at the preliminary hearing. Prior to the hearing, counsel sought issuance of subpoenas to compel the attendance of three witnesses. He supported this request with an allegation that these witnesses were "material and necessary to the defense, and that they were alleged eye-witnesses to the so-called occurrence."[1] The Commissioner refused to issue subpoenas. The Record of Proceedings recites his reasons as: "Probable Cause rests on testimony adduced by the Govt.—Rule 17b [of the Federal Rules of Criminal Procedure] requires evidence of witness to be material to the defense." The hearing was held and a police officer testified concerning statements which these witnesses had made to him. The witnesses did not appear. The Commissioner found probable cause and ordered petitioner held to answer in the District Court.

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[1] The Commissioner's Record of Proceedings recites that counsel "Filed Motion for Issuance of 3 named witnesses—averring testimony relative to the issue of probable cause." That motion, however, is not in the record. At the hearing in the District Court, present counsel offered to prove that the representation quoted in the text was made to the Commissioner and had the Legal Aid attorney available to testify. The Government informed the District Court that "we do not object to that proffer."

An indictment was subsequently returned and present counsel was appointed to represent petitioner in the District Court. A number of motions were filed,[2] including a motion to dismiss the indictment or, alternatively, to remand for a proper preliminary hearing. When that motion was denied, petitioner instituted this proceeding.

We have recognized that the preliminary hearing is an important right of an accused affording him "(1) an opportunity to establish that there is no probable cause for his continued detention * * * and (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him." *Blue* v. *United States, supra,* 119 U. S. App. D. C. at 322, 342 F. 2d at 901 (footnote omitted). We have held that the accused is entitled to the assistance of counsel at such hearings[3] and that he may obtain subpoenas to compel the attendance of "material witnesses reasonably requested * * *."[4] Moreover, we have held that the right to a pre-

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[2] Among other pre-trial motions, petitioner sought access to certain police records contending that they constituted public records within the contemplation of 4 D. C. Code §§134, 135. We think the District Court's ruling on this point is not reviewable by extraordinary writ. *Carter* v. *Schweinhaut,* No. 19,044, decided by order February 2, 1965. Similarly, we decline now to review the District Court's refusal to appoint a private investigator pursuant to petitioner's application under the Criminal Justice Act, 18 U. S. C. §3006A(e).

[3] *Holmes* v. *United States,* No. 19,519, decided July 21, 1966; *Dancy* v. *United States,* 124 U. S. App. D. C. 58, 361 F. 2d 75 (1966); *Blue* v. *United States, supra.* This right is now codified in the Federal Rules of Criminal Procedure. See F. R. CRIM. P. 5(b), 44(a).

[4] *Washington* v. *Clemmer,* 119 U. S. App. D. C. 216, 219, 339 F. 2d 715, 718 and 119 U. S. App. D. C. 226, 339 F. 2d 725 (1964).

liminary hearing, if timely asserted, is not forfeited solely by the later return of an indictment.[5]

The Government makes no effort to defend the Commissioner's ruling that probable cause rests solely on the Government's evidence. Probable cause rests, as Rule 5(c) explicitly states, on "the evidence" presented which necessarily includes that adduced by the accused either in cross-examination of Government witnesses or by the introduction of independent evidence or testimony. The Commissioner sits as a judicial officer to sift all the evidence before resolving the probable cause issue, *Washington* v. *Clemmer*, *supra* at 227-228, 339 F. 2d at 727-728, and cannot decline to issue subpoenas on the ground that only the Government's evidence is probative.

At oral argument, although not in its opposition, the Government contended that the showing before the Commissioner was insufficient to warrant the issuance of subpoenas. We disagree.[6] Petitioner sought to compel the at-

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[5] In addition to the cases cited in note 3, *supra*, cf. *Drew* v. *Beard*, 110 U. S. App. D. C. 198, 199, 290 F. 2d 741, 742 (1961). While our cases have required a showing sufficient to permit an "informed speculation that the trial itself was * * * prejudicially affected" if the preliminary hearing point is raised after conviction, *Shelton* v. *United States*, 120 U. S. App. D. C. 65, 66, 343 F. 2d 347, 348, cert. denied, 382 U. S. 856, 86 S. Ct. 108, 15 L. Ed. 2d 93 (1965), pre-trial relief in accordance with the procedure detailed in *Blue* v. *United States*, *supra*, turns on whether the requirements of Rule 5 have been followed and whether the accused has otherwise been "substantially afforded * * * the opportunities and information to which he was entitled under our decision in Blue * * *." *Carter* v. *Schweinhaut*, No. 19,044, decided by order February 2, 1965. Were the rule otherwise, Rule 5 could "be disregarded and set at naught with impunity." *Dancy* v. *United States*, *supra* note 3, 361 F. 2d at 78.

[6] We read the Commissioner's Record in conjunction with the factual proffer made in the District Court. See note 1, *supra*. Petitioner's counsel announced that he had "finished the statement as to the facts" and the Government informed the District Judge that it "would not object to Your Honor's acceptance" of the facts.

tendance of three eyewitnesses to the alleged crime, "averring testimony relative to the issue of probable cause." Such witnesses are within the compass of *Washington* v. *Clemmer, supra,* where we said: "[l]ikely to be called on this basis, in addition to alibi witnesses, are the complainant and other material witnesses named in the complaint who for some reason have not been called by the Government." 119 U. S. App. D. C. at 219, 339 F. 2d at 718.[7]

This is not to say that an accused may in all circumstances require subpoenas for the production of the Government's witnesses. However, where an accused shows that witnesses are material to the issue of probable cause, requests for subpoenas for such witnesses should be granted. This is consistent with the principal purpose of the preliminary hearing as a mechanism to determine whether the evidence is adequate to establish probable cause. Whatever the full reach of the accused's subpoena rights at a preliminary hearing, we hold that he is entitled to compel the attendance of eyewitnesses unless, of course, "because of physical or psychological disability in a particular case" such witnesses cannot attend. *Washington* v. *Clemmer, supra* at 219 n. 11, 339 F. 2d at 718 n. 11. Moreover, to hold otherwise would be to sanction a distinction between

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The Government's position, both in the District Court and in its filed opposition, is that the indictment rendered moot any infirmities in the preliminary hearing procedure. Having followed this course, we do not think the Government can now argue a factual issue which petitioner was prepared to prove but failed to do so because the Government interposed no objection to his statement of facts. *Cf. Giordenello* v. *United States,* 357 U. S. 480, 488, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958).

[7] The three witnesses were identified in the affidavit annexed to the complaint and incorporated therein by reference. Additionally, the record shows that these three were the Government's only witnesses before the Grand Jury and, in fact, are the only persons known by the Government "to be witnesses of the crime set forth in the indictment * * *."

the indigent accused who must rely on the Commissioner for the issuance of subpoenas and his moneyed counterpart who can secure subpoenas instantly by paying the statutory service and witness fees.

From the foregoing, we think it clear that the Commissioner improperly declined to issue the subpoenas which petitioner had timely requested and that, in consequence, petitioner was deprived of a proper preliminary hearing in accordance with Rule 5. Under our holdings in *Blue* and *Washington*, this would ordinarily suffice to warrant issuance of the writ. The Government, however, citing *Jaben* v. *United States*, 381 U. S. 214, 85 S. Ct. 1365, 14 L. Ed. 2d 345 (1965), argues that the return of an indictment renders any defect in the preliminary hearing procedure "moot." *Jaben* was quite a different case. There, a complaint alleging violations of the tax laws was filed within the limitation period but no preliminary hearing was held. An indictment was returned after the limitation period had run. The Government contended that the timely filing of the complaint tolled the statute; Jaben argued contrary. The Supreme Court sustained the Government's contention and held that the prosecution was not barred by the statute of limitations. In the course of the majority opinion, Mr. Justice Harlan observed:

> "[W]e think that the Government must proceed through the further steps of the complaint procedure by affording the defendant a preliminary hearing as required by Rule 5, unless before the preliminary hearing is held, the grand jury supersedes the complaint procedure by returning an indictment." 381 U. S. at 220, 85 S. Ct. at 1369.

It is this language on which the Government relies. But the Court was careful to point out that Jaben, who was

represented by counsel and at liberty on bond, made no effort to obtain a preliminary hearing during the one month interval between the filing of the complaint and the return of the indictment. 381 U. S. at 221 n. 3, 85 S. Ct. at 1369 n. 3. *Accord, Crump* v. *Anderson*, 122 U. S. App. D. C. 173, 352 F. 2d 649 (1965). We find nothing inconsistent between such a rule and our holding in *Blue* involving defective preliminary hearings which have been held prior to the indictment or improperly waived prior to the indictment. Indeed, in *Blue* we were careful to point out that persons intending to challenge an alleged defect in the preliminary hearing procedure should do so promptly and before trial. 119 U. S. App. D. C. at 321-322, 342 F. 2d at 900-901. *Jaben* does not undermine the holding in *Blue* that an accused who demands the preliminary hearing as his right is entitled to such a hearing and that, if the point is properly and timely pressed, a denial of that hearing cannot be excused by pointing to an intervening grand jury indictment.[8]

Finally, we simply note a point not raised by the Government. Obviously, since defects in the preliminary hearing procedure affect the determination of probable cause and the confinement which rests on such a determination, remedial measures should be promptly undertaken. Where an accused is adequately represented by counsel in the in-

[8] At one point in the proceedings, Jaben did complain of the denial of an opportunity to cross-examine witnesses at a preliminary hearing. *United States* v. *Jaben*, 226 F. Supp. 757, 758 (W. D. Mo. 1963). That point was abandoned on appeal, no doubt due to Jaben's one month acquiescence during which no hearing was held. We have examined the petition for writ of certiorari and the briefs filed with the Supreme Court in *Jaben* and note: (1) the only issue raised in the Supreme Court was the statute of limitations issue and (2) the *Blue* line of cases dealing with proper preliminary hearing procedures was not discussed, or even cited, in the briefs.

terim between the hearing and arraignment following the return of an indictment, and where no adequate excuse for failure to raise the preliminary hearing defect earlier is tendered, a serious question of timeliness would be presented. However, since neither the District Judge nor the Government raised this point, and since this is a capital case, we are not inclined to decide the issue *sua sponte*. We repeat what was said in *Blue*: "These remedies should, of course, be asserted at the earliest possible moment. Where, however, indictment occurs before it is feasible for assertion or resolution of the claim to have been made, relief is not to be denied for that reason alone." 119 U. S. App. D. C. at 321 n. 7, 342 F. 2d at 900 n. 7.

We think the District Judge should have granted petitioner's motion and remanded for a proper preliminary hearing where he could subpoena and examine the three witnesses whose attendance he timely and adequately sought. We are certain that the District Court will promptly insure that this is done. Accordingly, in lieu of the writ prayed for, we will direct our Clerk to transmit a certified copy of this opinion forthwith.

So ordered.

Before BAZELON, *Chief Judge*, and FAHY, DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM, LEVENTHAL and ROBINSON, *Circuit Judges*, in Chambers.

ORDER

PER CURIAM:

On consideration of respondent's petition for rehearing *en banc* and of petitioner's memorandum in opposition thereto, it is

Ordered by the court, *en banc,* that respondent's aforesaid petition is denied.

FAHY, *Circuit Judge,* concurs in the foregoing order denying rehearing *en banc* and files a separate statement.

MCGOWAN and LEVENTHAL, *Circuit Judges,* concur in the foregoing order denying rehearing *en banc* for the reasons set forth in their separate statement filed this day.

DANAHER, *Circuit Judge,* for the reasons set forth in his separate statement filed this day would grant respondent's aforesaid petition.

BURGER, *Circuit Judge,* for the reasons set forth in his separate statement filed this day in which TAMM, *Circuit Judge,* joins would grant respondent's aforesaid petition.

ROBINSON, *Circuit Judge,* for the reasons set forth in his separate statement filed this day would grant respondent's aforesaid petition.

STATEMENT OF CIRCUIT JUDGE FAHY

FAHY, *Circuit Judge*:

I was a member of the three-judge division which rendered its opinion January 23, 1967. I add a few lines now to point out that the denial of a rehearing *en banc* is not by the votes of only these three members of the court; it is by a majority of the nine active members of the court. These are the only judges authorized by statute to determine the question of rehearing *en banc* in this case. Moreover, the several opinions and statements now filed by members of the court demonstrate that a majority of the nine judges authorized to participate are of the opinion that the issuance of an indictment does not necessarily bar

a supplementary hearing in case of serious defect in the preliminary hearing. The purpose of the Government's petition for rehearing *en banc* was to establish the contrary principle. Its contention has been before us a number of times and consideration has been given to the petition for rehearing *en banc*. So while the position has not formally been presented in a brief styled a brief on the merits, or orally argued at this time, it is one that has been pondered long and hard.

Putting aside the issue of principle above referred to, and turning to the issue whether this particular case is one for disapproval of the Commissioner's conduct of the preliminary hearing, it is obvious that rehearings *en banc* are at times denied without necessarily approving a division's disposition of the particular case.* For reasons which might differ, a majority of the active members conclude that the facts of this particular case are not such as to indicate that *en banc* consideration would be fruitful in terms of broad principles for future application.

STATEMENT OF CIRCUIT JUDGES McGOWAN AND LEVENTHAL AS TO WHY THEY VOTE TO DENY REHEARING *En Banc*

The Government's petition for rehearing *en banc* is not unpersuasive in respect of the confusion which it asserts the panel's opinion will intensify. It would have us resolve this confusion by deciding *en banc* that an indictment always and invariably moots the defects of a preliminary hearing. It was presumably the Government's preoccupation with the attractions of this broad principle that caused it to fail to raise the factual point which might well have led to a different result, *i.e.*, the failure of appellant to seek

* See *e.g.*, statement of Burger, *J.*, in *Washington* v. *Clemmer*, 119 U. S. App. D. C. 216, 225, 339 F. 2d 715, 724 (1964).

timely relief. Because that issue is not significant enough to justify *en banc* consideration, we have voted to deny the petition.

Bearing in mind that rehearings *en banc* are an exceptional device for clarifying and shaping the law of the circuit on important issues, we think it undesirable to embark on such clarification in a case which may reasonably be classified as atypical. It will be difficult enough to draw the line for ordering a supplementary preliminary hearing when the petitioner has been diligent, but frustrated, in pursuing his efforts to obtain information in order to terminate unlawful detention. Attempting to develop applicable principles in the absence of a critical context seems to us not only difficult but unsound. Had the timeliness issue been raised, a full development of the facts relevant to it would have been had, and this case could and should have been disposed of by reference to it in the first instance. There would have been no occasion to decide, in the abstract, the question of whether the return of an indictment uniformly moots the matter of a preliminary hearing. The most recent experience of this court with the grant of a Government petition for rehearing *en banc* seeking a broad doctrinal declaration hardly encourages us to repeat it so soon. See *Harris* v. *United States*, 126 U. S. App. D. C. ——, 370 F. 2d 477 (1966).

The record shows that appellant had counsel before May 17, 1966, the date set for the preliminary hearing. Indeed, on May 13 counsel moved for the issuance of the subpoenas here in question. That motion was denied the same day. Thus, four days before the preliminary hearing, counsel knew that he could not have ther the witnesses he wanted. If he thought that the presence of those witnesses was important to the issue of the deprivation of appellant's

liberty, he should have sought relief immediately from the District Court. Instead, he did nothing, the preliminary hearing was held, and appellant continued in jail. On July 13—almost exactly two months later—the indictment was returned.

This is not a *Blue*[1] case. There, the accused was not provided with counsel, and had no preliminary hearing. The court announced in *Blue* for the first time that, in the District of Columbia by reason of the Legal Aid Agency Act, the accused should be offered counsel by the Commissioner—a right now reflected in the Federal Rules. The court knew that there must be defendants who, at the time *Blue* came down, had already been indicted but not tried. The court did not regard these indictments as wiping out the Commissioner's failure to furnish them with counsel as it found he was required to do under the D. C. statute. The court was careful to say that any of these defendants who wanted the hearing which they had foregone without the advice or assistance of counsel should seek it before trial.

We think a similar principle should apply to those defendants who, although provided with counsel before the Commissioner and who have had hearings, contend that the hearings were significantly defective in some respect. To say that the preliminary hearings were defective is to say that the determination of probable cause was inadequate and should not operate to deprive the accused of his liberty pending grand jury consideration. Wholly apart from the disorderliness and potential waste involved in not seeking correction of the Commissioner until after the

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[1] *Blue* v. *United States*, 119 U. S. App. D. C. 315, 342 F. 2d 894 (1964), cert. denied, 380 U. S. 944, 85 S. Ct. 1029, 13 L. Ed. 2d 964 (1965).

grand jury has acted, it would seem to us to be the plain duty of counsel to try to save his client from a custody which he believes may prove to be improper.

The focus of the solicitude embodied in the procedural device of the preliminary hearing is the liberty of the accused. Should it be taken away from him because there is probable cause to believe that he has committed a crime for which the grand jury will indict? To the extent that the prosecution is put to its proof of such probable cause, the accused in effect gets discovery of that much of the Government's case as is comprised of the evidence it adduces to establish probable cause. But that is an inevitable consequence of the hearing, and not its primary purpose. It may well be that there is language in the *Blue* opinion which obscures this true relationship of discovery to probable cause. But, however cloudy or misconceived that language may be, the relationship, as it is given to us to understand it, is as described above.

It does not follow from this that the return of an indictment automatically forecloses the question of a preliminary hearing. *Jaben* v. *U. S.*,[2] is at best a Delphic utterance on this point, since what four justices of the Supreme Court said there was in the context of a claim that the Government had filed a last-minute complaint solely for the purpose of tolling the statute of limitations pending grand jury presentment. In *Blue*, the court was not prepared to permit the right to counsel there articulated to be rendered academic by the easy supposition that the anticipated grand jury action would moot the defect.

This aspect of *Blue* would be set at naught if the Government were right in its contention that an indictment is

[2] 381 U. S. 214, 85 S. Ct. 1365, 14 L. Ed. 2d 345 (1965).

a jurisdictional bar precluding any subsequent effort to supplement a defective preliminary hearing. The Government would also immunize from judicial scrutiny a practice whereby preliminary hearings are avoided through continuances granted routinely until mooted by an indictment.[3] If such a practice were attempted in the District, we would find no insuperable barrier in meeting the problem through the sanction of requiring a hearing after indictment. Similarly, we see no jurisdictional barrier to a like sanction for coping with the withholding of critical witnesses whose testimony is the key to the issue of the reasonableness of continued detention. The compelling reason justifying that sanction is to avoid the threat to personal liberty—the risk of unlawful detention without probable cause—inherent in such practices, and not their denial of the limited degree of discovery which a preliminary hearing incidentally, though inescapably, provides. Whether and how that sanction is to be used should await delineation in cases involving the claim that indictments cause the frustration of timely efforts to cure defective proceedings.

It is our belief that discovery in criminal cases should be substantially enlarged, and we regret that those who had the drafting of the Federal Rules in charge did not go beyond the amendments effective July 1, 1966. But the preliminary hearing is neither a proper nor an adequate substitute for the more comprehensive discovery which we think those Rules should be enlarged to provide. We see no reason why the scope of the discovery available to a defendant should turn on whether he has been proceeded

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[3] In a statement to the Senate on February 9 last, Senator Tydings indicated that this was the practice "in at least one important district."

against in the first instance by complaint before a magistrate or by grand jury indictment.

Extension of the discovery principle through stretching the preliminary hearing entails extension of proceedings before a judicial or quasi-judicial official who may not be suitable for the role of supervising discovery in felony cases (whether a commissioner or judge normally engaged in trial of misdemeanors), and without any possibility of mutuality of discovery.

In introducing legislation which would, among other things, deal definitively with the question of when the return of an indictment puts to rest the matter of a preliminary hearing, Senator Tydings, in the Senate speech referred to above, set forth these findings of his Subcommittee on the use of the preliminary hearing as a discovery vehicle:

> At our hearings, there was a considerable amount of discussion of the preliminary hearing as a discovery device. Most witnesses concluded, however, that they would prefer that adequate discovery be provided by other means, and that the discovery question be treated separately from that of the preliminary hearing. We agree. The preliminary hearing is not well suited for discovery for a number of reasons. First, under current doctrines it will always be possible to bypass the preliminary hearing—and therefore discovery—by proceeding rapidly to indictment after arrest or by arresting the defendant only after an indictment has been returned, in which case the Rule 5 preliminary hearing process is not involved at all. Second, it is possible to hold a preliminary hearing on only one of several charges, and later to indict and

try the defendant on other charges. Third, the amount of discovery that a defendant receives in a preliminary hearing depends on the amount of proof the commissioner requires the Government to bring forward to establish probable cause; this may be quite a bit, or it may be very little, but in either event it need not be all the evidence within the possession of the Government that should be subject to discovery. Moreover, the preliminary hearing should be conducted promptly after arrest, but a discovery proceeding is probably more efficiently conducted at a later stage, closer to trial, after counsel has had an opportunity to reflect at leisure about the defense, and when the evidence against the accused is likely to be more complete.

We believe that discovery in criminal cases should stand on its own feet. It should not be inextricably entwined in the process of establishing probable cause, but should be designed to facilitate an exchange of information making the trial a more rational method of determining the truth. As such, discovery should be available to all defendants, including those whose arrest following indictment takes them out of the Rule 5 preliminary hearing process, and including those who for one reason or another do not get a preliminary hearing.

Therefore, we feel that discovery, apart from the preliminary hearing, should be handled in the Federal Rules of Criminal Procedure. A new Rule 16, which liberalizes somewhat criminal discovery procedures, took effect last July 1. Some people feel that this new rule does not go far enough, particularly in that it does not cover statements of witnesses and does not

contemplate the possibility of the taking of depositions. We hope that the Supreme Court and the Judicial Conference and its committees will carefully scrutinize the operation of the new Rule 16 and will give consideration to further liberalization of the criminal discovery procedures in the Federal courts, so that the Congress does not have to act. This is one area in which we have lagged behind a number of our more progressive State court systems. 113 Cong. Rec. 1883, 1885 (daily ed., Feb. 9, 1967).

We have no difficulty with the panel's holding as to the merits of appellant's original request for subpoenas, at least when that holding is closely related to the record. The Government's witness at the preliminary hearing was a policeman who gave a hearsay account of what he had been told by three eye-witnesses to a capital crime. A judicial officer engaged in a judicial determination of probable cause can hardly rest easy solely with the hearsay account of the policeman of what these eye-witnesses told him if the eye-witnesses can be available, so that he can listen to their versions and observe their demeanor, and provide an opportunity to defense counsel to explore their account on cross-examination.[4] The presence of those witnesses impresses us as falling within the orbit of the rights conferred upon the accused by the fourth sentence

[4] We do not intend to imply that if the judicial officer is satisfied from the account of an eye-witness that probable cause exists he is nevertheless obligated to hear other witnesses, or provide the accused with an opportunity to examine them. This would provide a discovery that is not merely incidental to the establishment of probable cause. However, the accused would still be entitled to summon witnesses under a proffer that they would so negative probable cause as to establish his right to be free of detention. *Washington v. Clemmer*, 119 U. S. App. D. C. 216, 339 F. 2d 715 (1964).

of Rule 5(c), FED. R. CRIM. P. The getting of eye-witness testimony on record before trial, either by preliminary hearing or otherwise, is not, incidentally, an invariable disadvantage to the prosecution. The Government can be greatly embarrassed by eyewitnesses who see things differently by the time trial is reached. See *Coleman* v. *United States*, 126 U. S. App. D. C. ——, 371 F. 2d 343 (1966), cert. denied, 386 U. S. 945, 87 S. Ct. 979, 17 L. Ed. 2d 875 (1967). So viewed, this holding does not open up the Government's entire evidence in every case to discovery at the preliminary hearing.

We end where we began, with the judgment that this is not an appropriate case for clarification through rehearing *en banc*. An apparent majority of the judges of this court have already pondered the question enough to know that they do not accept the Government's sweeping claim of immunity on jurisdictional grounds. We agree with the Government that supplementary hearings are not available purely as discovery, but we also believe they may be available in case of serious defect in the preliminary hearing that supposedly justified the restraint on liberty. Further clarification is best provided, we think, through traditional judicial development in terms of concrete cases where diligent efforts have come to naught.

STATEMENT OF CIRCUIT JUDGE DANAHER AS TO WHY HE VOTES TO GRANT REHEARING *En Banc*

DANAHER, *Circuit Judge*:

Here the Government has asked for *en banc* consideration of the January 23, 1967 opinion of a division of this court. We know, as a practical fact, that the Solicitor General, deeming the issue of importance, must have ap-

proved the Government's petition. He cannot be unaware that there is now and that for the last few years there has been substantial disagreement among the judges of this court on the matter of "discovery" in preliminary hearings. In this area as in yet others where close questions have arisen with resulting controversy, resolution of the conflicting viewpoints of the judges of this court should be attempted.

Sometimes only two judges, again as in the instant case, three, undertake to promulgate as law their own particular conclusions no matter what other judges of the court may take to be the proper rule. Guided by pronouncements of the Supreme Court and by the views particularly of other United States Courts of Appeals in analogous situations, some of the non-sitting judges, perhaps not unreasonably, think they should have the benefit of oral argument respecting novel, significant and important positions when urged upon the court. If for example, in the instant case, the three sitting judges are convinced of the rectitude of their position that "discovery" should by command of the court be made available at preliminary hearings, I would have supposed they should be the first to seek majority concurrence. Of course I realize at once that by the mere exercise of power and by the denial of opportunity to the non-sitting judges to learn the nature and the scope and the extent of a particular ruling, compliance with the literal language of 28 U. S. C. §46(c) has been had. Obviously, unless a majority of the Circuit Judges in regular active service shall so vote, the non-sitting judges will not have heard the arguments of the Government nor will they have had an opportunity, as at an oral presentation, for appropriate questioning to ascertain the impact of the rule pronounced by the sitting division in a given case.

The President's Commission on Crime in the District of Columbia recently observed in its report released December 15, 1966, pages 324, 325:

> "[T]he Commission is concerned by the widespread community feeling that the outcome in a particular case too often depends on the choice of judges.
>
> We believe that the court should be sensitive to the effects of judicial dissension on the public, those convicted of crime, and attorneys who argue before the court. The nature of the court's peculiar jurisdiction in the District makes an appearance of uniformity more critical than in courts concerned exclusively with Federal crimes. Increased use of the en banc procedure may contribute to this salutary result." [1]

The Commission went on to point out

> "that appellate rulings have a vital impact on the total law enforcement process, both in terms of the substance of particular judicial restrictions and the certainty with which they can be relied upon by police, prosecutors and trial courts. In deciding particular cases, the court bears the heavy responsibility for weighing these considerations in an effort to reach a result fair to the community as well as to the defendant."

No amount of sophistry can obscure the ultimate fact that the sitting division had hoped to engraft upon our

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[1] And see my discussion re *en banc* hearings in *Cafeteria & Restaurant Wkrs. U., Local 473* v. *McElroy*, 109 U. S. App. D. C. 39, 51, 55 *et seq.*, 284 F. 2d 173, 185, 189 *et seq.* (1960), 367 U. S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961); *Hansford* v. *United States*, 124 U. S. App. D. C. 387, 398, 365 F. 2d 920, 931 (1966).

courts their own theory of discovery, notwithstanding that the Rules promulgated by the Supreme Court and approved by Congress, make no provision for any such result. Suppose a single eyewitness to a murder shall at preliminary hearing identify the accused as the culprit, may not the magistrate find probable cause to hold him? Must every other of many witnesses likewise be produced? There can be no question that in furtherance of the concept of a search for truth, many learned judges and commentators have sought an extension of pretrial discovery in criminal cases. 8 MOORE'S FEDERAL PRACTICE-CIPES ¶1.07 Committee Note [2] (1966), relating to proposed amendments to Rule 16, points out that here is "a complex and controversial issue." Cited are various source references and cases which have considered the problem. But the fact remains that the Federal Rules of Criminal Procedure, despite much urging, have never provided for the type of pretrial discovery which the sitting division would here enjoin upon the District Court and the United States Commissioner, especially since an indictment had been returned.

It has long been settled law, both in this Circuit and elsewhere that there is not even a constitutional right to a preliminary hearing prior to indictment or prior to trial. *Clarke* v. *Huff*, 73 App. D. C. 351, 119 F. 2d 204 (1941). Jurists like Chief Justice Vinson and Associate Justice Rutledge, when members of this court, and the late Chief Judges Groner and Stephens (to mention only noted Chief Judges now deceased) never had the slightest doubt that *Goldsby* v. *United States*, 160 U. S. 70, 73, 16 S. Ct. 216, 218, 40 L. Ed. 343 (1895) had stated the law when the Court said:

> "The contention at bar that because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guaranty to be confronted by the witnesses, by mere statement demonstrates its error."

The rights of the accused, said the Supreme Court, were to be determined and protected at trial. *Ex Parte United States,* 287 U. S. 241, 250, 53 S. Ct. 129, 77 L. Ed. 283 (1932). Mindful, obviously, that such was the law, the Supreme Court has recognized that probable cause for the detention of an accused to stand trial might be established by a valid indictment by a grand jury. So wrote Mr. Justice Black in *Costello* v. *United States,* 350 U. S. 359, 363, 76 S. Ct. 406, 100 L. Ed. 397 (1956), and so thought Mr. Justice Holmes writing for the Court in *Holt* v. *United States,* 218 U. S. 245, 247, 31 S. Ct. 2, 54 L. Ed. 1021 (1910). And see *Jaben* v. *United States,* 381 U. S. 214, 220, 85 S. Ct. 1365, 14 L. Ed. 2d 345 (1965); and Mr. Justice Rutledge writing for this court in *Jordon* v. *Bondy,* 72 App. D. C. 360, 114 F. 2d 599 (1940). He observed that it had been repeatedly held that the prosecution is under no obligation to call all witnesses subpoenaed by the Government.

If references to such cases and their holdings may suggest a lack of uniformity either in approach or in the decisional process, I suggest that the exhortation of the President's Commission, *supra,* should here be regarded. I vote for rehearing *en banc* that those of us who have not heard the Government's statement of its position may the more certainly appraise the issue. If mine is not a reasonable position with reference to the exercise of power by this court, it may not be taken amiss if I suggest that Congress in its consideration of problems of law enforce-

ment in the District of Columbia make provision that the return of a valid indictment will, *ipso facto*, establish probable cause to hold an accused for trial irrespective of any decision or rule of court.

STATEMENT OF CIRCUIT JUDGES BURGER AND TAMM ON VOTES TO GRANT REHEARING *En Banc*

BURGER, *Circuit Judge* (with whom TAMM, *Circuit Judge* joins):

Despite the fact that a Grand Jury has returned an indictment, the opinion of the sitting division which four judges voted to review[1] directs the District Court to order another preliminary hearing before the accused is tried. The opinion of the sitting division does not tell us what can be accomplished by such a remand or whether a United States Commissioner can conduct some sort of "appellate" review of the action of a Grand Jury. The sitting division's opinion, therefore, presents a very important and recurring question as to the relationship between a preliminary hearing and an indictment; it intensifies the confusion surrounding the role of the preliminary hearing which began with a misconception of what the *Blue* opinion really meant. For these reasons we voted to grant the government's petition for rehearing *en banc*.

Judges McGowan and Leventhal seem to say that if the case were heard by the full court it *might* be decided on a narrow factual basis outside the framework of issues posed by the Government and that such a narrow aspect does not

[1] The Department of Justice so rarely asks us to rehear a case *en banc* that we ought to give great weight to those few requests it makes, as the Supreme Court does to petitions for a writ of certiorari authorized by the Solicitor General.

warrant *en banc* consideration. This overlooks the fact that we can, as we often do in granting an *en banc* hearing, define the issues to be considered. The question presented by the Government's petition is not what disposition may be made of this particular case if it is heard *en banc;* rather the question before us now is whether the sitting division's opinion will create confusion in the day-to-day administration of justice if it is left standing without an examination by the full Court. It may be that the Court *en banc* would decide the case on the narrow factual element referred to, although we seriously doubt it, but the failure of the sitting division to decide the case on that ground should not insulate from examination by the rest of us of what six members of the Court—Judges McGowan and Leventhal included—seem to consider a confusing holding in an important area of the law.

Judges McGowan and Leventhal also suggest, if we read them correctly, that while it is difficult to draw a line for ordering a "supplemental" preliminary hearing where the petitioner has been diligent, it is both difficult and unsound to do so where he was not diligent. This anticipates what an *en banc* court would consider, *i.e.*, whether a preliminary hearing can have any purpose or function after an indictment.[2]

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[2] Judges McGowan and Leventhal express a desire for a reserved power of "sanction" against prosecutors and United States Commissioners but it is interesting to note that the sitting division did not order the hearing as a sanction. Judges McGowan and Leventhal pose, in their "sanction" point, a very important question which has not been briefed or argued and we are not in a position to pass on it. We note, however, that they reserve this "sanction" power on the basis of a statement attributed to a Senator that "in at least one important district" (unnamed) the Government is receiving continuances of preliminary hearings until the Grand Jury acts and mootness can be claimed.

In this case, of course, Appellant had a preliminary hearing long before he was indicted. Thus Judges McGowan and Leventhal are

Judges McGowan and Leventhal emphasize that a preliminary hearing's purpose is the determination of probable cause for detention and that, while "discovery" may sometimes be a consequence of a preliminary hearing, it is not the purpose but a by-product. This statement assumes special significance coming from Judge McGowan as the author of *Blue*. We would have thought it more orderly and efficient judicial administration if Judges McGowan and Leventhal would have permitted the four judges who want an *en banc* hearing to participate in the usual way in any pronouncement on this important question—*after* full hearing. However, since we are not to have a full-scale hearing we are left to indicating our general acceptance of the long standing precedents on this subject, and to that extent we agree with Judges McGowan and Leventhal that a preliminary hearing is an examination to determine probable cause for continued detention.

It should be clear from all that has been said by or on behalf of the six non-sitting judges, that a majority of the Court does not agree with the three judges of the sitting division in their effort to re-write the procedure authorized

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talking about "sanctions" simply on the basis of a statement in Congress about the Government's practice in *one* of the 90 United States Districts and without regard to the facts of this case or inquiry into whether there is any such practice in *this* district. If, on evidence, we should ever find that a United States Commissioner is acting improperly this Court and the District Court can summarily direct him to alter his practices. We have no evidence whatever on this score.

If we assume the extraordinarily remote possibility that the United States Commissioner after hearing the alleged "critical witnesses" concludes no probable cause is shown, would anyone suggest he could *reverse* the Grand Jury! The heart of the "sanction" therefore is that the Commissioner and the United States Attorney will have been made to "stand in the corner" because subpoenas were not issued. We ought not suggest the use of judicial power so casually and with so little purpose.

In any event, our colleagues' discussion of "sanctions" is irrelevant to the *en banc* petition.

by Congress for a preliminary hearing so as to convert it into a discovery mechanism. We have no doubt that District Judges and others who deal with these hearings will take an accurate "head count."

We join in expressing our agreement with the statements of Judges Danaher and Robinson.

STATEMENT OF CIRCUIT JUDGE ROBINSON AS TO WHY HE VOTES TO GRANT REHEARING *En Banc*

SPOTTSWOOD W. ROBINSON, III, *Circuit Judge*:

I share with other members of the court deep concern over the increasing uncertainty left in the wake of the decisional series headed by *Blue*. The difficulty could, of course, be dissipated by firm judicial definitions as to the legitimate function of the preliminary hearing and the impact of an intervening indictment. But during the more than two years elapsing since the panel decision in *Blue*, the full court has not dealt with these broad, recurrent questions. This, in my judgment, has promoted the impression we now find in this important area of the law.

Because I think *en banc* consideration is overdue, I have voted to grant the Government's petition. In doing so, I perceive no impediment to reaching the basic issues, which the statements subscribed by five of my colleagues in some measure address. I have not joined in any of these expressions, and do not intimate an individual view on the merits, since neither course would contribute to the solution present conditions demand. Clarification by the court as a whole, after briefing and argument, appeals to me as the only method by which we can hope to discharge our responsibility to mold stable procedures to govern preliminary hearings in the District of Columbia.

Constitutional Provision Involved

Amend. VI, U. S. Const.: *Jury Trial for Crimes, and Procedural Rights.*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Motion of Petitioner Michael V. Sciortino for an Order in the Nature of a Writ of Mandamus

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 31677

MICHAEL V. SCIORTINO,

Petitioner,

—v.—

THE HONORABLE ROBERT C. ZAMPANO,
UNITED STATES DISTRICT JUDGE,

Respondent.

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1. The jurisdiction of this Court is predicated upon 28 U. S. C. §1651(a).

2. Petitioner Michael V. Sciortino is charged by complaint, dated June 21, 1967, with a violation of 21 U. S. C. §§331(q) and 360a(b) and by a three-count indictment, filed July 10, 1967, with violations of 21 U. S. C. §§331(q)(2) and 360a(b), which charges are now pending in the United States District Court for the District of Connecticut.

3. Respondent The Honorable Robert C. Zampano is a United States District Judge for the District of Connecticut.

4. Petitioner was arrested on June 22, 1967, on a warrant issued by United States Commissioner Thomas F. Parker on a complaint of James B. Dow, Agent, Bureau of Drug Abuse Control. Copies of the complaint and warrant are attached as exhibit A and exhibit B, respectively.

5. Upon petitioner's arrest, and as a consequence of petitioner's arrest, there was extensive news coverage of

this case, as reflected in exhibit C and exhibit D annexed to this motion.

6. On June 22, 1967, petitioner was brought before United States Commissioner George Saden in Bridgeport, Connecticut, for proceedings pursuant to Rule 5, Federal Rules of Criminal Procedure.

7. On June 22, 1967, pursuant to the provisions of Rule 5(b), Federal Rules of Criminal Procedure, petitioner was admitted to bail without surety, and the preliminary examination required by Rule 5(c) was, by agreement of counsel, adjourned until July 11, 1967.

8. After being informed by the Government that the case against petitioner would be submitted to a Grand Jury on July 10, 1967, petitioner filed his Motion for Order (1) Restraining and Enjoining the United States Attorney from Presenting This Case to the Grand Jury and (2) Dismissing the Complaint and Discharging Defendant Unless the United States Attorney Proceeds to a Preliminary Examination Pursuant to Rule 5, dated July 7, 1967, which was heard by respondent on July 10, 1967, prior to the convening of the Grand Jury. A copy of petitioner's motion, dated July 7, 1967, is annexed to this motion as exhibit E.

9. On July 10, 1967, respondent denied petitioner's motion. A copy of respondent's order of July 10, 1967, is annexed to this motion as exhibit F.

10. After respondent's order of July 10, 1967, the Grand Jury returned an indictment against petitioner, alleging in three counts, violations of 21 U. S. C. §§331(q)(2) and 360a(b). A copy of the indictment is annexed to this motion as exhibit G.

11. On July 19, 1967, at a hearing before United States Commissioner Carroll W. Brewster, to whom the matter

was referred because of the disqualification of Commissioner Saden, the Government objected to proceeding with the preliminary examination pursuant to Rule 5(c) because of the return of the indictment by the Grand Jury on July 10, 1967. The preliminary examination was continued to July 24, 1967, by the Commissioner, and a subpoena directed to Valerie Hageman was issued by the Commissioner at petitioner's request. A copy of the subpoena is attached to this motion as exhibit H.

12. On July 24, 1967, prior to the scheduled time for the preliminary examination pursuant to Rule 5(c), the Government moved to quash the subpoena issued by the Commissioner at petitioner's request.

13. On July 24, 1967, respondent granted the Government's motion to quash the subpoena.

14. Respondent's order of July 10, 1967, denying petitioner's motion dated July 7, 1967, and respondent's order of July 24, 1967, granting the Government's motion to quash the subpoena issued by the Commissioner on petitioner's behalf, deny petitioner his right to a preliminary hearing following an arrest under a warrant issued upon a complaint as guaranteed by Rule 5, Federal Rules of Criminal Procedure; deny petitioner his right to be informed of the nature and cause of the accusation as guaranteed by the Sixth Amendment to the Constitution of the United States; deny petitioner his right to be confronted with the witnesses against him as guaranteed by the Sixth Amendment to the Constitution of the United States; deny petitioner his right to have compulsory process for obtaining witnesses in his favor as guaranteed by the Sixth Amendment to the Constitution of the United States; deny petitioner his right to have the assistance of counsel for his defense as guaranteed by the Sixth Amendment to the Constitution of the United States; and deny petitioner due

process of law as guaranteed by the Fifth Amendment to the Constitution of the United States.

15. The present action is necessary and appropriate in aid of this Court's jurisdiction in that the issue here presented may be rendered moot by a final judgment in the district court. But for review by this action, this Court may otherwise be unable to review respondent's orders which raise significant questions regarding (1) the rights of accused persons secured by the Constitution and the Federal Rules of Criminal Procedure and (2) the Court's exercise of its customary and traditional supervisory powers over the conduct of criminal procedures in the district courts.

WHEREFORE, petitioner prays this Court to issue its opinion directing that respondent vacate his rulings of July 10, 1967, and July 24, 1967, so that petitioner may be afforded a preliminary hearing in accordance with the provisions of Rule 5 of the Federal Rules of Criminal Procedure, together with the right to compulsory process to obtain witnesses on his behalf.

Dated at Bridgeport, Connecticut, this 6th day of September, 1967.

DAVID GOLDSTEIN
David Goldstein

JACOB D. ZELDES
Jacob D. Zeldes

L. DOUGLAS SHRADER
L. Douglas Shrader

955 Main Street
Bridgeport, Conn.

Attorneys for Petitioner,
Michael V. Sciortino

EXHIBIT A ANNEXED TO MOTION OF PETITIONER

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Commissioner's Docket No. 1

Case No. 233

UNITED STATES OF AMERICA

—v.—

MICHAEL V. SCIORTINO

Complaint for Violation of U.S.C. Title 21 Sections 331q and 360a(b)

Before:

THOMAS F. PARKER,
Name of Commissioner

799 Main Street
Hartford, Connecticut
Address of Commissioner

The undersigned complainant being duly sworn states:

That on or about June 6, 1967, at Bridgeport, in the District of Connecticut [1]Michael V. Sciortino did[2] while acting not in the ordinary course of his profession, sell to another

[1] Insert name of accused.

[2] Insert statement of the essential facts constituting the offense charged.

person 1,000 tablets of Obedrin, a stimulant drug within the meaning of 21 U.S.C., Sec. 321, in violation of 21 U.S.C., Secs. 331q and 360a(b).

And the complainant states that this complaint is based on a confidential informant, who has given reliable information in the past which has resulted in numerous convictions, has reported to the Undersigned that on June 6, 1967, she purchased from Michael V. Sciortino, M.D. 1,000 tablets of Obedrin for $500.00 and that this was one of a series of purchases she had made of depressant and stimulant drugs from Dr. Sciortino; that she is not a patient of Dr. Sciortino and that during several of these purchases she discussed with Dr. Sciortino the fact that these drugs were not for her personal or medical needs.

And the complainant further states that he believes that the Undersigned is a material witness in relation to this charge.

/s/ JAMES B. DOW
Signature of Complainant.

James B. Dow
Agent, Bureau of Drug Abuse Control
Official Title.

Sworn to before me, and subscribed in my presence, June 21, 1967.

/s/ THOMAS F. PARKER
Thomas F. Parker
United States Commissioner.

EXHIBIT B ANNEXED TO MOTION OF PETITIONER

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Commissioner's Docket No. 1
Case No. 233

UNITED STATES OF AMERICA

—v.—

MICHAEL V. SCIORTINO

WARRANT OF ARREST

To the United States Marshal, His Deputy, or Any Other Officer Authorized to Execute

You are hereby commanded to arrest Michael V. Sciortino, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with unlawfully selling a drug called Obedrin in violation of U.S.C. Title 21, Sections 331q and 360a(b).

here insert name of defendant or description

here describe offense charged in complaint

Date June 21, 1967.

1. Here insert designation of officer to whom warrant is issued.

/s/ THOMAS F. PARKER
United States Commissioner.

Thomas F. Parker

RETURN

Received June 22, 1967 at Hartford, and executed by arrest of Michael Sciortino at Bridgeport, Conn on June 22, 1967.

JAMES B. Dow

Name.

Agent, BDAC

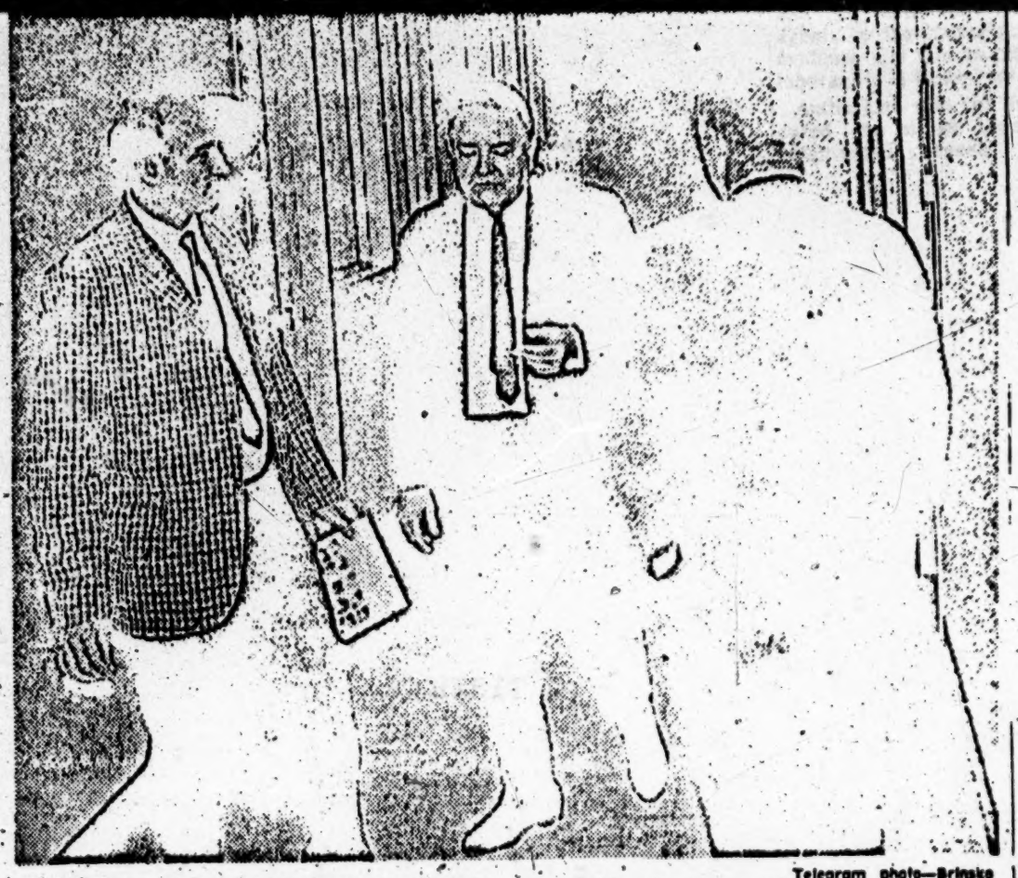
Title.

THE BRIDGEPORT TELEGRAM

BRIDGEPORT, CONN., FRIDAY MORNING, JUNE 23, 1967 56 Pages

Published Daily 410 State St., Bridgeport

Second Class Postage Paid at Bridgeport, Conn.



Telegram photo—Brinsko

DOCTOR AFTER ARREST—Dr. Michael V. Sciortino, 54, of 155 Brooklawn avenue, is brought out of the Detective bureau at Police headquarters last night. He had been photographed and fingerprinted after his arrest for violation of federal drug abuse control laws. He is the first Connecticut physician arrested under the drugs laws which were passed in 1965.

Dr. Sciortino Held In Drug Sale Case

Dr. Michael V. Sciortino, 54, of 155 Brooklawn avenue, last night became the first Connecticut physician to be arrested for violation of new federal drug abuse control legislation under which a doctor may prescribe certain drugs, but not sell them to patients.

Three-Month Investigation

Dr. Sciortino was arrested at his home last night by federal agents following a three month investigation.

At a preliminary arraignment last night before U.S. Commissioner George Saden, Dr. Sciortino was released in his own recognizance pending a hearing on Tuesday morning.

Sgt. Wilbur Barrett, of the Bridgeport Police Special Services division, said the three month investigation began within the Bridgeport police department and agents of the Federal Bureau of Drug Abuse Control.

Agents of the Narcotics Squad of the State Police Division of Criminal Intelligence were called in as it progressed.

1,000 Tablets for $500

U.S. Attorney Jon O. Newman said the arrest was made on a warrant issued yesterday in Hartford charging Dr. Sciortino with the sale of 1,000 Obedrin tablets to a woman for $500.

It was not known last night if the woman to whom the sale was made was a law enforcement agent.

Commissioner Saden said the alleged offense was a misdemeanor under Title 21, Section 331 Q and 360 B governing "drug

(Continued on Page Two)

Dr. Sciortino Facing Drug Abuse Charges

(Continued from Page One)

abuses" under which the physician may prescribe certain drugs but is not allowed to sell them to patients himself.

Drugs Confiscated

A quantity of drugs, all stimulants, was brought to Police headquarters last night.

The confiscated drugs have been sent to the Bureau of Drug Abuse Control laboratory in Boston for analysis, according to Sgt. Barrett.

Dr. Sciortino was arrested at his home and brought to Police headquarters for fingerprinting and photographing prior to his preliminary arrangement before Commissioner Saden.

He spoke with his attorney by telephone at Police headquarters.

None Illegally Produced

All the drugs confiscated were manufactured and procured in ormal commercial fashion, police said.

The druges, contain in various ize bottles and vials, were either apsules or pills. They were labeled as potentially habit forming and a notice that federal law required them to be sold only by prescription was also printed on the label.

EXHIBIT C

EXHIBIT C ANNEXED TO MOTION OF PETITIONER

438

THE BRIDGEPORT POST

BRIDGEPORT, CONN., FRIDAY, JUNE 23, 1967.

Published Daily at 410 State St., Bridgeport, Conn. 06602

Second Class Postage Paid at Bridgeport, Conn.

Doctor Arrested in Sale Of Drug Pills to 'Patient'

Dr. Michael V. Sciortino, 54, of 155 Brooklawn avenue, was arrested last night by Federal agents as an aftermath of a joint investigation with Bridgeport and State police into the illegal sale of stimulant drugs by the physician to a woman patient.

'Undercover' Agent Used

Authorities said the woman patient, not identified, was actually a police "undercover" agent.

Dr. Sciortino, who was taken into custody in his home on a Federal warrant, is the first Connecticut physician to be charged with violating recent drug abuse control legislation enacted by Congress in 1965.

The arrest followed a three-month probe started by Bridgeport Special Service division detectives who uncovered information of an alleged drug abuse law violation here.

Agents of the Federal Bureau of Drug Abuse Control and troopers from the State police criminal intelligence unit joined in the probe as the investigation progressed.

Tablets Sold for $500

U. S. Attorney Jon O. Newman said the Federal warrant was issued yesterday in Hartford, charging Dr. Sciortino with the sale of 1,000 tablets of a drug known as Obedrin to a woman patient for a fee of $500.

Dr. Sciortino was taken to Police headquarters last night for questioning and later was presented before U. S. Commissioner George A. Saden.

He was released on his own recognizance pending a hearing Tuesday.

Commissioner Saden said the doctor is charged with violating Federal laws concerning drug abuses in which a physician may

(Continued on Page Four)

Doctor After Arrest

Post photo—Decerbo

Dr. Michael V. Sciortino (right), 54, of 155 Brooklawn avenue, leaves elevator in Police headquarters last night after he was arrested on a charge of violating the Federal drug abuse control laws. U.S. Marshal Anthony DiRenzo is at left.

DOCTOR IS HELD IN SALE OF PILLS

(Continued from Page One)

prescribe certain drugs to a patient, but is not allowed to sell them to the patient himself.

A quantity of drugs in capsule and pill form were seized by agents in the doctor's home as evidence and sent to the Federal laboratory in Boston for analysis.

Authorities said the doctor procured the drugs from normal commercial channels.

EXHIBIT D ANNEXED TO MOTION OF PETITIONER

44a

EXHIBIT D

EXHIBIT E ANNEXED TO MOTION OF PETITIONER

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Commissioner's Docket No. 1
Case No. 233

UNITED STATES OF AMERICA

—v.—

MICHAEL V. SCIORTINO

MOTION FOR ORDER (1) RESTRAINING AND ENJOINING THE UNITED STATES ATTORNEY FROM PRESENTING THIS CASE TO THE GRAND JURY AND (2) DISMISSING THE COMPLAINT AND DISCHARGING DEFENDANT UNLESS THE UNITED STATES ATTORNEY PROCEEDS TO A PRELIMINARY EXAMINATION PURSUANT TO RULE 5.

1. On June 21, 1967, a warrant for defendant's arrest for an alleged violation of 21 U.S.C. §331q and §360a(b) was issued by Thomas F. Parker, United States Commissioner, on a complaint filed and executed on that date by James B. Dow. Copies of the warrant and complaint are annexed to this motion as Exhibits A and B.

2. Defendant was arrested, presented before United States Commissioner George A. Saden and admitted to bail, all on June 22, 1967.

3. Upon defendant's arrest and as a consequence of defendant's arrest, newspapers afforded extensive news coverage to this case, as reflected in Exhibits C and D annexed to this motion.

4. At the hearing before Commissioner Saden on June 22, 1967, the preliminary examination pursuant to Rule 5 of the Federal Rules of Criminal Procedure was continued to July 11, 1967, with notice to both parties.

5. The United States Attorney will present this case to a forthcoming session of the grand jury, in an effort to obviate the preliminary examination before the Commissioner scheduled for July 11, 1967, according to information and belief. Under local procedure stenographic minutes of grand jury proceedings are not always maintained.

6. A grand jury indictment in this case would deprive defendant of his right to a preliminary examination pursuant to Rule 5 of the Federal Rules of Criminal Procedure, his right not to be held to answer a criminal charge in the absence of a determination that there is probable cause to believe that an offense has been committed and that defendant committed this offense, which determination shall be made without effect of publicity caused by the arrest instituted by the Government, his right to confront witnesses against him, his right to be informed of the charge against him, his right to subpoena witnesses in his own behalf, and his right to due process of law, all in violation of Rule 5 of the Federal Rules of Criminal Procedure and Amendments V and VI to the United States Constitution.

WHEREFORE, defendant moves for an order:

A. Restraining and enjoining the United States Attorney from presenting this case to the grand jury or in any way causing the grand jury to consider this case prior to a preliminary examination pursuant to Rule 5 of the Federal Rules of Criminal Procedure; and

B. Dismissing the complaint and discharging defendant, unless the United States Attorney proceeds to a preliminary examination pursuant to Rule 5 of the Federal Rules of Criminal Procedure within 30 days or such other time as to which counsel may agree.

Dated at Bridgeport, Connecticut, this 7th day of July, 1967.

DAVID GOLDSTEIN
David Goldstein

BERNARD S. PECK
Bernard S. Peck

JACOB B. ZELDES
Jacob B. Zeldes

955 Main Street
Bridgeport, Conn.

Attorneys for Defendant,
Michael V. Sciortino

EXHIBIT F ANNEXED TO MOTION OF PETITIONER

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Commissioner's Docket No. 1
Case No. 233

UNITED STATES OF AMERICA

—v.—

MICHAEL V. SCIORTINO

NOTICE OF MOTION

To: Hon. Jon O. Newman
United States Attorney
Federal Building
450 Main Street
Hartford, Connecticut

Please take notice that the undersigned will bring on for hearing the defendant's Motion for Order (1) Restraining and Enjoining the United States Attorney from Presenting This Case to the Grand Jury and (2) Dismissing the Complaint and Discharging Defendant Unless the United States Attorney Proceeds to a Preliminary Examination Pursuant to Rule 5, dated July 7, 1967, before this Court in the Post Office Building, City of New Haven,

on the 10th day of July, 1967, at the hour of 10:00 a.m., or as soon thereafter as the Court will hear counsel.

Dated at Bridgeport, Connecticut, this 7th day of July, 1967.

/s/ JACOB D. ZELDES
Jacob D. Zeldes
955 Main Street
Bridgeport, Conn.
Attorney for Defendant,
Michael V. Sciortino

Motion denied.

ROBERT C. ZAMPANO
U.S.D.J.

EXHIBIT G ANNEXED TO MOTION OF PETITIONER

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Criminal No. 12025

UNITED STATES OF AMERICA

—v.—

MICHAEL V. SCIORTINO, M.D.

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about May 29, 1967, in the District of Connecticut, MICHAEL V. SCIORTINO, M.D., a duly licensed physician, did sell a quantity of a depressant or stimulant drug, to wit: 225 tablets of obedrin, 203 tablets of desbutal, 64 capsules of dexamyl, 50 capsules of eskatrol and 100 tablets of desoxyn, to another person, and MICHAEL V. SCIORTINO, M.D., was not then acting in the course of his professional practice, in violation of Title 21, United States Code, Sections 331(q)(2) and 360a(b).

PENALTY: Title 21, United States Code, Section 333(a).

COUNT TWO

On or about June 1, 1967, in the District of Connecticut, MICHAEL V. SCIORTINO, M.D., a duly licensed physician, did sell a quantity of a depressant or stimulant drug, to wit: 648 tablets of obedrin, to another person, and MICHAEL V. SCIORTINO, M.D. was not then acting in the course of his professional practice, in violation of Title 21, United States Code, Sections 331(q)(2) and 360a(b).

PENALTY: Title 21, United States Code, Section 333(a).

COUNT THREE

On or about June 2, 1967, in the District of Connecticut, MICHAEL V. SCIORTINO, M.D., a duly licensed physician, did sell a quantity of a depressant or stimulant drug, to wit: 1,000 capsules of obedrin, to another person, and MICHAEL V. SCIORTINO, M.D., was not then acting in the course of his professional practice, in violation of Title 21, United States Code, Sections 331(q)(2) and 360a(b).

PENALTY: Title 21, United States Code, Section 333(a).

COUNT FOUR

That on or about June 6, 1967, in the District of Connecticut, MICHAEL V. SCIORTINO, M.D., a duly licensed physician, did sell a quantity of a depressant or stimulant drug, to wit: 1,000 tablets of obedrin, to another person, and MICHAEL V. SCIORTINO, M.D., was not then acting in the course of his professional practice, in violation of

Title 21, United States Code, Sections 331(q)(2) and 360a (b).

PENALTY: Title 21, United States Code, Section 333(a).

A TRUE BILL

/s/ JAMES M. SHEPHERD
Foreman

/s/ JON O. NEWMAN
Jon O. Newman
United States Attorney

EXHIBIT H ANNEXED TO MOTION OF PETITIONER

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Commissioner's Docket No. 1
Case No. 218

UNITED STATES OF AMERICA

—v.—

MICHAEL V. SCIORTINO

SUBPOENA

To. Valerie Hazeman
name of witness

You are hereby commanded to appear before the undersigned United States Commissioner at U.S. Post Office Bldg., Hartford on the (illegible) day of July, 1967 at 12 o'clock ....M. to testify in the above entitled proceeding.

This subpoena is issued on application of Jack D. Zeldes.

Date: July 25, 1967.

CARROLL W. BROEDER,
United States Commissioner.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 902

MICHAEL V. SCIORTINO, PETITIONER

v.

THE HONORABLE ROBERT C. ZAMPANO,
UNITED STATES DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The relevant facts are undisputed and are set forth in the opinion of the court of appeals (Pet. App. 1–7). Petitioner, a Connecticut physician, was arrested on June 22, 1967, upon a commissioner's warrant charging him with the unlawful sale of depressant and stimulant drugs, in violation of 21 U.S.C. (Supp. II) 331(q), 360a(b). He was immediately brought before the commissioner and admitted to bail. A preliminary hearing was postponed until July 11 at the request of petitioner's counsel. On July 10, the respondent District Judge denied petitioner's motion to enjoin the United States Attorney from presenting the case to the federal grand

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jury, and later that day the grand jury returned an indictment. On July 11, the commissioner continued the preliminary hearing until July 24 and issued a subpoena directed to the government's principal witness. On July 24, respondent granted the government's motion to quash the subpoena, and the commissioner adjourned the hearing. Petitioner thereafter filed a motion for a writ in the nature of mandamus in the United States Court of Appeals for the Second Circuit requesting that the district court be directed to provide petitioner with a preliminary hearing. The motion was denied on November 3, 1967.

The single issue in this case is whether petitioner had a right to a preliminary hearing notwithstanding the fact that a grand jury indictment had been returned. The decision of the court of appeals is correct, and there is no occasion for further review by this Court. The courts of appeals which have considered the question, with the exception of the District of Columbia Circuit, have unanimously held that the purpose of a preliminary hearing under Rule 5(c), F.R. Crim. P., is to determine whether there is probable cause to believe that the defendant committed the charged offense, and that the return of an indictment thus obviates the need for a hearing. *E.g., United States* v. *Aiken*, 373 F. 2d 294 (C.A. 2), certiorari denied, No. 94, this Term (October 9, 1967); *United States ex rel. Dale H. Synder* v. *Turley*, C.A. 3, No. 16479, affirmed without opinion March 9, 1967, certiorari denied, No. 315, this Term (October 9, 1967);

United States v. *Chase*, 372 F. 2d 453, 467 (C.A. 4); *Vincent* v. *United States*, 337 F. 2d 891, 896 (C.A. 8), certiorari denied, 380 U.S. 988; *Byrnes* v. *United States*, 327 F. 2d 825, 834 (C.A. 9), certiorari denied, 377 U.S. 970. This Court recently intimated its agreement with that position in *Jaben* v. *United States*, 381 U.S. 214, 220.

Petitioner contends that the decision below is in conflict with the District of Columbia Circuit's holding in *Ross* v. *Sirica*, 380 F. 2d 557 (C.A.D.C.), that the return of an indictment does not cure defects in the preliminary hearing procedure. See also *Blue* v. *United States*, 342 F. 2d 894 (C.A.D.C.), certiorari denied, 380 U.S. 944. He argues that the District of Columbia Circuit has recognized that the preliminary hearing is intended to afford a defendant an opportunity to discover the government's case, which is not satisfied by the return of an indictment. However, as we pointed out in our Memorandum in Opposition in *Snyder*, *supra*, the state of the law in the District of Columbia on this issue is far from clear. In *Crump* v. *Anderson*, 352 F. 2d 649 (C.A.D.C.), decided after *Blue* but before *Ross*, a panel of the court of appeals reached a result opposite from that in *Blue* and *Ross*. In the *Ross* case, the government's petition for a rehearing *en banc* was denied *per curiam* by a 5–4 vote. Most of the judges filed separate statements which indicated that a majority of the court rejected the view that the preliminary hearing has an independent "discovery" function which would require that

a hearing be held after an indictment had been returned.[1]

The particular facts of the *Ross* case, moreover, raise some doubt whether the decision stands for the broad proposition, urged by petitioner, that a timely request for a preliminary hearing, notwithstanding a supervening grand jury indictment, must always be granted to facilitate defendant's discovery of the government's case (Pet. 6–7). The defendant in *Ross* was charged with a capital offense. After denying defendant's motion for the issuance of subpoenas for the government's three eye-witnesses to the crime, the commissioner found probable cause at the preliminary hearing on the basis of a police officer's hearsay testimony concerning statements which those witnesses had made to him, and continued the defendant in custody. An indictment was returned two months later, and subsequently the district court denied defendant's motion to remand the case for a preliminary hearing at which the government's three eye-witnesses could be subpoenaed and examined.

On defendant's motion for a writ in the nature of mandamus, the court of appeals ordered the case remanded for a second preliminary hearing (Pet. App. 9a–10a, 18a–19a). Viewed in this context, the decision of the court of appeals may reasonably be

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[1] The majority voting to deny the government's petition for rehearing *en banc* was comprised of the panel which decided *Ross* (including Judge Fahy, since retired) and Judges McGowan and Leventhal, who stated that the case was not appropriate for clarification through rehearing. (Pet. App. 17a–25a.)

interpreted as holding merely that a defendant who may be faced with prolonged detention as the result of a finding of probable cause at a preliminary hearing must be afforded an adequate opportunity to test the evidence on which that finding is based. The ambiguity of the *Ross* decision is further demonstrated by the fact that the panel which ordered the case remanded for a hearing did not indicate whether the commissioner would again have the responsibility of determining probable cause or what effect a finding of no probable cause would have on the existing grand jury indictment (Pet. App. 30a, 32a n.2 (Statement of Circuit Judges Burger and Tamm on Votes to Grant Rehearing *En Banc*)). In the absence of further clarification by the entire court of appeals on the question involved in the present case, it cannot fairly be said that there is a conflict warranting resolution by this Court.

In any event, the allegedly conflicting decisions fall within the special province of the Court of Appeals for the District of Columbia to fashion rules for its circuit. Whatever justification there may be for recognizing the utility of the preliminary hearing as a discovery device in connection with the type of local crimes falling within the jurisdiction of the District of Columbia, there is no basis on which to extend that concept to other federal circuits at this time. Indeed, as reported in the findings of the Senate Subcommittee on Improvements in Judicial Machinery, the preliminary hearing stage is generally unsuitable for

discovery purposes (113 Cong. Rec. S1885 (daily ed., February 9, 1967)).[2]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

JANUARY 1968.

[2] Petitioner's argument (Pet. 8–9) that the Constitution requires that a preliminary hearing be held for purposes of "discovery" is without merit. Although we agree, as he states, that it is constitutionally imperative that an accused be provided with counsel at the preliminary hearing, it does not follow that the Constitution requires that hearing in all events.

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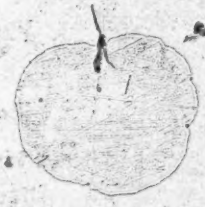

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 902

MICHAEL V. SCIORTINO,

Petitioner,

—v.—

THE HONORABLE ROBERT C. ZAMPANO,
UNITED STATES DISTRICT JUDGE,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In opposing the grant of certiorari in this case, the Government (1) attempts to eliminate the conflict between the decision of the court below in this case and the decision of the District of Columbia Circuit in *Ross* v. *Sirica*, 380 F. 2d 557 (D. C. Cir. 1967) (1a),[1] but (2) makes no comment at all upon the impact on the administration of criminal justice of the Government's widespread practice of avoiding Rule 5 hearings.

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[1] References are indicated as follows:

References to the numbered pages of petitioner's Petition for Writ of Certiorari (Pet.);

References to the numbered pages of the appendix to the Petition for Writ of Certiorari (a);

References to the numbered pages of the appendix to the Reply Brief for Petitioner (b);

References to the numbered pages of the Government's Memorandum (Govt. Memo.).

By way of reply, petitioner urges these points:

1. To avoid a conflict between the decision in this case and the decision in *Ross*, the Government reads *Ross* as ascribing no discovery function to the Rule 5 hearing (Govt. Memo. 4-5). This, of course, ignores the clear language of the opinion. *Ross* v. *Sirica*, *supra*, 380 F. 2d at 559 (10a).

Moreover, the Government's own view of *Ross*—that it merely permits an opportunity "to test the evidence on which that finding [of probable cause by the commissioner] is based" (Govt. Memo. 5)—concedes the discovery function of Rule 5. If *Ross* permits such a "test [of] the evidence", even after the grand jury has returned an indictment, *Ross* has to stand for precisely what it says: that Rule 5 affords an accused "'a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him.'" *Ross* v. *Sirica*, *supra*, 380 F. 2d at 559 (10a).

The conflict, then, is real. The separate statements denying an *en banc* rehearing (15a-33a) do not minimize that conflict. On the contrary, the court's action denying rehearing indicates a majority of the active judges did not desire to disturb the panel opinion in *Ross*.

2. Significantly, the Government offers no comment upon its widespread efforts to frustrate Rule 5's command that the commissioner "shall" hear the evidence after an accused is arrested. The manner in which the elimination of the Rule 5 hearing is accomplished in one busy district was detailed earlier (Pet. 9, n. 3). Since the decision in petitioner's case, there has been recognition in Connecticut that the right to a Rule 5 hearing, contrary to the clear command of the Rule, is now illusory. As U. S. Commissioner Brewster recently stated in a memorandum filed the day after the petition in this case was docketed:

> "If the United States Commissioner is charged under Fed. R. Crim. P. 5 (b) to tell the accused at the time of presentation after arrest that he has the right to a preliminary hearing, and that right can later be arbitrarily frustrated by the Government the result I believe is extremely unbecoming to the judicial system in the District" (6b).[2]

As the Commissioner's memorandum clearly indicates, the Government, in reliance on the decision of the court below, will immunize from judicial scrutiny a practice whereby preliminary hearings are avoided through continuances granted routinely until mooted by an indictment.

Conclusion

Unhampered by review by this Court, the decision of the court below will sanction the flagrant violation of Rule 5's clear command that once an accused is arrested he must be presented before a commissioner who "shall" hear the evidence.

For these reasons and for the reasons advanced in the petition, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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JACOB D. ZELDES
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Bridgeport, Connecticut
Counsel for Petitioner

January 18, 1968

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[2] Commissioner Brewster's memorandum describing the Government's means of frustrating Rule 5 rights in the District of Connecticut is set forth as an appendix to this brief (1b).

APPENDIX

Memorandum of Proceedings Before U.S. Commissioner Brewster

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

vs.

ALTAMESE SHIPMON and HUEY JONES.

Commissioner's Docket No. 1

Case Nos. 271 and 272

December 8, 1967

PROCEEDINGS BEFORE UNITED STATES COMMISSIONER

"Warrants of arrest were issued for ALTAMESE SHIPMON (Exhibit A) and HUEY JONES (Exhibit B), both of Hardscrabble Road, Croton Falls, New York, on December 1, 1967 on complaints filed by Thurl Stalnaker, Special Agent, Federal Bureau of Investigation, charging violations of Title 18, United States Code, Section 1952(a)(3) and Title 26, United States Code, Section 4411 and Section 7203. Both were arrested on December 2, 1967 (not December 3, 1967 as stated in the return on Miss Shipmon's warrant) and were presented before me on the afternoon of Decem-

ber 2, 1967 in Danbury, Connecticut. Both were advised of their rights pursuant to Fed. R. Crim. P. 5(b), and found indigent under the Criminal Justice Act. With the consent of the Assistant United States Attorney, Samuel J. Heyman, all charges under Title 26 were dismissed at the time of presentation, on the grounds that there was insufficient evidence to require purchase of the occupational tax stamp in Hartford, Connecticut. At the time she was presented Miss Shipmon stated that she was presently unemployed but had a job in the State of Florida and wanted to be free to go to this job on December 22, 1967, and therefore wanted the criminal charges resolved as soon as possible.

Since both Miss Shipmon and Mr. Jones requested that one lawyer be appointed to represent both of them, Gerald Frauwirth of Bridgeport was appointed on December 4, 1967 to represent both defendants (Exhibit C).

On December 5, 1967 Mr. Frauwirth called the United States Commissioner and requested a preliminary hearing. The United States Commissioner on December 5, 1967 telephoned the Assistant United States Attorney, Mr. Heyman, and told him that Mr. Frauwirth wanted a preliminary examination under Fed. R. Crim. P. 5(c) and asked Mr. Heyman to arrange a convenient time with Mr. Frauwirth. Mr. Heyman agreed and said that he would call Mr. Frauwirth.

On December 7, 1967 early in the morning, Mr. Frauwirth called the United States Commissioner to ask again for a date for the preliminary examination and said that his client wished to go to Florida to take up employment and would like the opportunity to be heard on the issue of probable cause immediately. The United States Commissioner called the Assistant United States Attorney, Mr.

Heyman, who said that he was not going to have any preliminary hearing and would under no circumstances present evidence if one was scheduled because (1) the defendants were out on bond, and (2) the Grand Jury was going to meet on December 11, 1967. The United States Commissioner said to Mr. Heyman that if defense counsel requested it, a preliminary hearing would be scheduled this week.

On December 8, 1967 at 9:30 a.m., Mr. Frauwirth, counsel for the accused, again called the United States Commissioner requesting a preliminary examination and said that he and his clients were available at any time during that day. The United States Commissioner told Mr. Frauwirth to call the Assistant United States Attorney and arrange a time, but that the United States Commissioner would be available all day and suggested 2:30 p.m.

The Assistant United States Attorney, Mr. Heyman, called me about 10:30 a.m. and represented to me that Mr. Thurl Stalnaker, the Special Agent of the F. B. I. in charge of the case, would be in Bethany, Connecticut at the Chiefs of Police Academy until 4:00 or 4:30 in the afternoon of December 8, 1967 and therefore would be unavailable until that time; the United States Commissioner suggested that the preliminary examination be held at 4:00 or 4:30. Mr. Heyman said that he would not be available after 4:00 p.m. on December 8, 1967, and that no lawyer in his office would be available to conduct the preliminary hearing after 4:00 p.m. In any case, Mr. Heyman stated that he was sticking to his position that no evidence would be put on by the Government on December 8, and that he would be available at 2:30 p.m. to put that on the record.

The United States Commissioner contacted Mr. Frauwirth's office to notify Mr. Frauwirth that the hearing was

set for 2:30 p.m., and in view of the intention of the Assistant United States Attorney to offer no evidence, the presence of the two accused was not required.

At the hearing scheduled at 2:30 p.m., the Assistant United States Attorney offered no evidence and stated that his only witness was busy at the Chiefs of Police Academy in Bethany, Connecticut, twenty minutes from the Courthouse, and was therefore not available until five o'clock, after which time no lawyer in the United States Attorney's Office was available to proceed with the hearing.

Fed. R. Crim. P. 5(c) states

> "If a defendant does not waive examination, the Commissioner shall hear the evidence within a reasonable time."

The purpose served by a preliminary hearing is to determine whether there is sufficient evidence as to warrant a defendant being held in custody or on bond to await action of a Grand Jury. *Boone* v. *United States,* 185 F. Supp. 411 (D. C. Ky. 1960) affirmed 280 F. 2d 911 (6th Cir. 1960). Of course, a continuance may be granted to either prosecution or defense for good cause shown. *United States* v. *Gray,* 85 F. Supp. 436 (D. C. D. C. 1949). And the Government has a right to a reasonable time to prepare its case. *United States* v. *Universita,* 192 F. Supp. 154 (S. D. N. Y. 1961). In the Manual for United States Commissioners prepared by a committee chaired by the Honorable Carroll C. Hincks of this Court, the following appears on page 9 under the heading Conduct of Preliminary Examination:

> "The defendant is not required to plead (Rule 5(c)). If preliminary examination has not been waived by

the defendant, the Commissioner should generally proceed forthwith, but if a postponement is requested by one side or the other to permit the attendance of witnesses or counsel, the Commissioner at any stage of the proceedings may postpone or continue the hearing for such a time as considerations of fairness to the defendant and the public interest require."

In view of the representation of the Assistant United States Attorney that the cases of the two here accused will be presented before the Grand Jury on December 11, 1967 and, if a true bill is returned, bench warrants will be requested, little in the interests of the accused or the public will be accomplished by dismissing the two Commissioner's warrants at this time. I believe, however, that a representation that an agent of the Federal Bureau of Investigation is unavailable because he is at a police academy twenty minutes from the Courthouse, and that therefore the United States Government cannot be expected to proceed is without merit. The agent was neither ill nor out of the State. Moreover, when for four days the Government knew that the accused was demanding the preliminary hearing and evaded the requests of the accused, this Commissioner believes that the rights of the accused to a preliminary examination for which at the time of his arrest and presentation had been expressly told by the United States Commissioner, as directed in Fed. R. Crim. P. 5(b) (1966), that they had the right, have been injured.

Sciortino v. *Zampano,* United States Court of Appeals for the Second Circuit, November 3, 1967, holds that the right to a preliminary examination under Fed. R. Crim. P. 5(c) expires when the accused is indicted. It does not hold that the Government has no further duties to have preliminary hearings under that Rule.

If the United States Commissioner is charged under Fed. R. Crim. P. 5(b) to tell the accused at the time of presentation after arrest that he has the right to a preliminary hearing, and that right can later be arbitrarily frustrated by the Government the result I believe is extremely unbecoming to the judicial system in this District.

Judge Hincks' rule quoted above seems the wise one. A preliminary examination under Fed. R. Crim. P. 5(c) should proceed forthwith upon initial presentation unless postponement is requested by either side either (1) to permit attendance of witnesses or (2) to permit attendance of counsel. In these cases the accused were unrepresented at the time of initial presentment and requested a postponement until counsel be appointed under the Criminal Justice Act. At the time set down counsel for the Government and for the accused were present; the Government's witness was twenty minutes from the Courthouse. The Assistant United States Attorney had known about the case for more than a week and had known of the accused's request for a preliminary examination for four days. There was no reason whatsoever why the Government could not have gone forward.

Counsel for the accused requests that the warrants be dismissed. I do not believe in view of the announced intention of the Assistant United States Attorney to present these cases to the Grand Jury on December 11, 1967 that the interests of the accused would be sufficiently served by dismissal to deny the present request of the Government for a postponement at this late date. I must assume that the refusal of the Assistant United States Attorney to present evidence for the Government on December 8, 1967 constitutes a request for a continuance. The continuance will therefore be granted until December 11, 1967.

The Commissioner accepts full responsibility for this injury to the defendants: in short, I incorrectly assumed after calling the Assistant United States Attorney on December 5, 1967 that a convenient time for the preliminary examination would be set by the Assistant United States Attorney and the counsel for the accused.

Since for the reasons above stated the way that the Government has handled these cases does not comport with this Commissioner's understanding of the spirit and letter of Fed. R. Crim. P. 5 and the quoted rules written by Judge Hincks, I asked that a copy of this statement of proceedings be transmitted to the Chief Judge in the hope that guidelines will be set by him and the Judges in this District. This is particularly urgent since, as predicted by Professor Moore, 8 *Moore, Federal Practice* 5-32 (1965), the rights of accused under Fed. R. Crim. P. 5(c) are now as never before being given the "vigorous test" by counsel now appointed at this early stage in the proceedings under the Criminal Justice Act.

A transcript of the proceedings before this United States Commissioner on December 8, 1967 is available from Harold J. Moan, Court Reporter, New Haven, Connecticut.

Copies of this statement of proceedings before United States Commissioner were today sent to Gerald Frauwirth, Samuel J. Heyman, the Hon. William H. Timbers, Chief Judge, and were filed in the Clerk's Office of the United States District Court in New Haven, Connecticut.

Dated at New Haven, Connecticut this 12th day of December 1967.

/s/ CARROLL W. BREWSTER
Carroll W. Brewster
United States Commissioner

[Exhibits omitted]

UNITED STATES OF AMERICA,
DISTRICT OF CONNECTICUT, *ss.*:

I, GILBERT C. EARL, Clerk of the United States District Court for the District of Connecticut, do hereby certify that the annexed and foregoing is a true and full copy of the original Proceedings Before United States Commissioner filed in Criminal Case No. 12,117, entitled United States of America vs. Altamese Shipmon and Huey Jones, et als., on December 12, 1967, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at New Haven this 21st day of December, A. D. 1967.

GILBERT C. EARL,
Clerk.

By .....
Deputy Clerk.

[SEAL]